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Beyond Liberal Political Morality: A Critique Of State Colonization Of Civil Society In Canada

by

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Canada

This thesis is dedicated to

Kenneth & Maria (my parents), my brothers and relatives, especially Aunty Esther, for all the years of love
Gift, for more love and that special light
Afolabi Caxton-Martins & Ben Unaegbunam, for the effort that made it possible for me to come to the U of A
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Prof. DeCoste, for showing me the simple ways to greatness

and most of all
to **God**
for everything.

ABSTRACT

In recent times, judges and other officials of the Canadian state have engaged themselves in the colonization and management of civil society. This essay critiques this emerging trend and offers a normative view of the relationship, in liberal states, between law, the state and civil society. It is proposed that this relationship subsists mainly in the separation of the state from civil society and deference by the state to the institutions, traditions and practices of an independent civil society, save where interference is necessary to prevent and punish the infringement of individual rights. It is argued that this proposition is embodied in a liberal view of civil society and coincides with principles integral to liberal political morality including the rule of law and separation of powers. In support of this argument, much of the essay elaborates on the liberal understanding of civil society and political morality and the connection between them.

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CHAPTER ONE

AN INTRODUCTORY OVERVIEW OF THE EMERGING RELATIONSHIP BETWEEN THE LIBERAL STATE AND CIVIL SOCIETY IN CANADA

1.1 Recent Trends

Loren Lomasky begins his insightful discussion on liberal theory and the concept of civil society with the following description of liberalism:

> Liberalism offers an account of political justice. It holds out no comprehensive catalog of the virtues, refrains from endorsing any specific conception of the good life, [and] *supplies no depiction of the delights of intimate association or communal solidarity.*[1]

This view of liberalism may no longer be accurate, especially in light of certain recent occurrences in Canada's liberal democratic polity. There is good reason to believe that the relationship between Canada's liberal state and social life no longer conforms to those laudable credentials of liberalism to which Lomasky refers. For

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[1] Loren E. Lomasky, "Classic Liberalism and Civil Society" in Simone Chambers & Will Kymlicka, eds., *Alternative Conceptions of Civil Society* (Princeton, NJ: Princeton University Press, 2002) 50 at 50 [emphasis added] [endnotes omitted].

example, one hears in the news everyday of the zealous commitment of governments across Canada to anti-tobacco regulation and employee health and wellness programs which unjustifiably privilege and endorse particular lifestyles above others, or seek to prevent individuals from harming themselves. There are also alarming indications that the traditional boundaries that exist in liberal societies between a characteristically limited government and a civil society populated by persons are withering away. As some recent court decisions, which I shall discuss shortly, illustrate, the judicial arm of government is opening up the doors of civil society and life wide to government actors with consequences that intrusively change the traditions, values and practices of liberal civil society.[2]

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[2] By liberal civil society, I refer to civil society, as it exists under the conditions of liberal governance. However, it suffices to point out that the institutions of civil society, even in liberal states, need not share liberal values, not least all of them. Throughout this essay, the phrase is employed in the sense of a liberal concept of civil society, and not necessarily a concept of liberal civil society.

1.2 The Cases

In *Ryan v. Delahaye Estate*,[3] a parent, by her last will, bequeathed 80 percent of her estate to her son and 20 percent to her daughter. The reasons stated in the will for the larger bequest to the son were that he was of greater assistance to his parents while they were alive, that the daughter seldom visited or had contact with her parents, and that the daughter had already received gifts from a grandmother's estate. The daughter, Marcelle Ryan, brought a petition before the British Columbia Supreme Court challenging the mother's will under s. 2 of the *Wills Variation Act*[4] and asking for equal distribution of the estate. Evidence adduced at the trial showed that Ms. Ryan, a 60 year old lady, was mistreated by her parents her entire life, that they gave her a masculine-sounding name because they had wanted

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[3] [2003] 2 E.T.R. (3d) 107, 2003 BCSC 1081 [*Ryan* cited to E.T.R.].

[4] R.S.B.C. 1996, c. 490. The section reads:

> Despite any law or statute to the contrary, if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband or children, the court may, in its discretion, in an action by or on behalf of the wife, husband or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the wife, husband or children.

her to be a boy, and that they failed to pay for her education as they did for her brother, now aged 54. The Court also accepted evidence to show that the petitioner was of some support to the parents, and visited them occasionally. The Court, in a judgment delivered on 10 July 2003, overturned the will on the ground that the distribution was not valid and rational, and ordered the equal distribution of the estate, claiming that the revised will was the only way to make her parents finally "do right"[5] by her.[6] The Court then found that they had a duty to support the applicant because the testatrix

> had given her virtually nothing in an emotional or material way during her life. Marcelle did not have the same opportunities as Bernard as a child. Her life has been significantly different from Bernard's, in large part because of that deficiency. Today, her lack of skills and deteriorating health make her unemployable. Given the size of this estate, I am of the view that Marcelle was not adequately provided for and that she, like Bernard, is entitled to share in the financial rewards the parents acquired during their lives.[7]

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[5] *Ryan*, *supra* note 3 at 120.

[6] A number of cases have been decided under the *Wills Variation Act* in which conclusions similar to the *Ryan* decision were reached. See e.g. *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807; *Gray v. Gray Estate*, [2002] 210 D.L.R. (4th) 514, 98 B.C.L.R. (3d) 389 (B.C.C.A); *Clucas v. Clucas Estate*, [1999] 25 E.T.R. (2d) 175 (B.C.S.C.). The latter contains a summary of judicial interpretation of the *Wills Variation Act* in British Columbia.

[7] *Ryan*, *supra* note 3 at 120.

The *Ryan* decision primarily violates the principle of testamentary freedom, an ancient common law right which allows persons the right to dispose of their property as they see fit. Under the common law, testamentary freedom cannot be interfered with where a will is determined to be the result of the clear uninfluenced intention of a competent testator.[8] This is not the case in *Ryan*; rather, the Court, by

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[8] This common law rule has since been limited by statute. New Zealand was the first common law country to do so in 1900. The limitation depended upon the circumstances of each case and was entirely subject to the discretion of the courts. The court could vary the provisions of a will, against the testator's express wishes, in favour of widows and children. In Canada, various provinces including British Columbia, Ontario, Alberta, Nova Scotia, Saskatchewan, and Prince Edward Island have legislation limiting testamentary freedom. See e.g. *Family Relief Act*, R.S.A. 2000, c. F-5; *Testators' Family Maintenance Act*, R.S.N.S. 1989, c. 465; *Dependants of a Deceased Person Relief Act*, R.S.P.E.I. 1988, c. D-7; *Dependants Relief Act*, R.S.N.W.T. 1988, c. D-4. These statutes generally allow certain dependents to apply to court to vary a will in order to provide for their maintenance out of the testator's estate. Eligible dependents are mostly spouses and legitimate children, although most provinces have expanded eligibility to include illegitimate children, a brother or a sister, common law spouse, parent or grandparent. Given the recent developments in relation to same-sex marriage, some jurisdictions may soon include same-sex spouses in the definition of dependents. For a full review of the current position of Canadian law on limitations to testamentary disposition, see James Mackenzie, ed., *Feeney's Canadian Law of Wills*, 4th ed., looseleaf (Markham: Butterworths, 2000) para. 9. While I do not entirely agree with the statutory curtailment of a testator's complete freedom to dispose of his property, the objection raised here to the *Ryan* case is less concerned with the now commonplace

relying on an intrusive piece of legislation, discarded the principle of testamentary freedom in favour of the "testator's moral obligation to provide what is adequate, just and equitable"[9] to an independent adult child. In reaching its decision, the Court claimed to have exercised its broad discretion under s. 2 of the *Wills Variation Act* in the light of contemporary standards. According to the Court, contemporary standards create a reasonable expectation that children will share equally in their parents' estate. The Court also found that evidence adduced at the trial showed that the reasons for the unequal distribution were not accurate and as such, were not valid and rational. The Court's reasoning was that the treatment of the petitioner was not fair and since the parent did not address these prejudices in her will, it was well within its right to impose just and equitable standards in the distribution of property under the will. Therefore, the decision did not just interfere with testamentary freedom; it was also directed towards *overcoming the prejudices of family life*. By its decision, the Court wrongly appropriated to itself

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statutory and judicial limitation. Rather, the Court's reasoning on its ability to make the circumstances of family life 'right' are more suspect.

[9] *Ryan*, *supra* note 3 at 117.

the power to manage the circumstances of family life, notwithstanding the sufficiently clear instructions left behind by the testator. Favouring one child or family member over another, even in a prejudicial manner, is part of family life. Also, it is seldom out of place that parents pay biased attention to children they like, even to the detriment of those they dislike. In its application of the *Wills Variation Act*, the Court admitted itself into family life, and having opened that door, assumed the position of the overseer of family values. The Court was not merely saying that parents could not disinherit their children, but that they must love them or pay for the lack of love through their will. The Court also wrongly substituted its view of moral responsibility for that of the testatrix, who clearly felt and stated that she was not inclined to favour a child who had neglected her during her lifetime.

Moving beyond the *Ryan* engagement with managing private/personal intentions and reforming private values, Canadian judges and lawmakers, in excess of the mandate of the liberal state, continue to arrogate to themselves the role of restructuring basic values and institutions of Canadian civil society. An instance of this

excess is the Ontario Court of Appeal's notorious "same-sex marriage" decision in *Halpern v. Canada (Attorney General)*.[10] In this case, seven same-sex couples applied for civil marriage licences. The Clerk of the City of Toronto refused to grant the licenses until he had sought directions from the court on whether same-sex couples could be joined in marriage. The couples brought an application for judicial review of the Clerk's decision at the Divisional Court. The Court unanimously held that the common law definition of marriage infringed the couples' equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms*[11] and was not justified under s. 1 of the *Charter*. The Court ruled that an appropriate remedy for the *Charter* infringement was to allow Parliament two years to amend the common law rule. The Attorney General of Canada appealed on the equality issue, and the couples cross-appealed on the remedy. The Court of Appeal allowed the couples' appeal and dismissed the Attorney General's appeal. The Court's reasons in summary are as follows: (a) the institution of marriage in Canada was founded upon

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[10] [2003] 225 D.L.R. (4th) 529 (Ont. C.A.) [*Halpern*].

[11] Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

the common law rule in *Hyde v. Hyde and Woodmansee,*[12] which defines marriage as the "voluntary union for life of one man and one woman, to exclusion of all others"[13]; (b) the courts have jurisdiction to alter the common law definition of marriage and no resort to constitutional amendment procedures is required; (c) the common law rule discriminates against homosexual couples because it distinguishes them from heterosexual couples and denies them equal access to benefits that attach to marriage at law; (d) the discriminatory rule is an unjustifiable violation of the equality rights of homosexuals guaranteed by s. 15 (1) of the *Charter*. The Court then took the liberty to reformulate the definition of marriage to "the voluntary union for life of two persons to the exclusion of all others."[14] Regarding the question of remedy, the Court found that it would not cause any public harm or denial of the rule of law if its

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[12] (1866), [1865-69] L.R. 1 P. & D. 130, [1866] 14 L.T. 188 [*Hyde* cited to L.R. 1 P. & D.].

[13] *Ibid.* at 133.

[14] *Halpern, supra* note 10 at para. 156.

decision were to take effect immediately. Consequently, there was no reason to allow Parliament time to amend the common law rule.[15]

Much has been written in support of and against the judicial reconstruction of marriage in the manner achieved in *Halpern* and similar cases.[16] I have no intention to add to these debates in this essay. What suffices more for our present purpose is to address the judicial incompetence displayed by the Court with regard to two matters, namely, the Court's refusal to acknowledge the fact that marriage is primarily a social institution, and its inability to assess

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[15] Prior to the Ontario Court of Appeal decision in *Halpern*, the British Columbia Court of Appeal (B.C.C.A.) reached a similar decision on similar facts and issues in *Egale Canada Inc. v. Canada (Attorney General)*, [2003] 225 D.L.R. (4th) 472, 13 B.C.L.R. (4th) 1 [*Egale*]. However, the B.C.C.A. allowed Parliament a grace period to amend the common law rule on marriage. Following the *Halpern* decision, the appellants in *Egale* (the same-sex couples) reopened their appeal on the issue of postponement of remedy. The B.C.C.A. allowed the appeal and ordered that the remedies take effect immediately. See *Egale Canada Inc. v. Canada (Attorney General)*, [2003] 15 B.C.L.R. (4th) 226.

[16] See for example F.C. DeCoste, "The *Halpern* Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law" (2003) 41 Alta. L. Rev. 619; James G. McLeod, Annotation of *Halpern v. Toronto (City)*, [2003] 36 R.F.L. (5th) 127 at 129-134 (Ont. C.A.); Heidi Rogers, "*Halpern v. Toronto (City)*: Same-Sex Marriages: Who Should Make the Decision in a "Free and Democratic Society"?" (2004) 12 Tul. J. Int'l & Comp. L. 525.

the proper limits of law and liberal statecraft, over the institutions and traditions of civil society.

In order to bring marriage under its jurisdiction, the *Halpern* Court held that there is a distinction between marriage as a legal institution, and marriage as a social institution. The Court viewed the marriage issue in *Halpern* to be "solely about the legal institution of marriage,"[17] and not about its historical or social core. The Court then anchored the distinct legal meaning of marriage in Canada on the common law rule in *Hyde*. After concluding that the so-called rule in *Hyde* was a legal rule of a discriminatory nature, the Court felt that it had proper jurisdiction in accordance with *Charter* principles to dismantle the discriminatory common law invention.

A useful critique of the above reasoning is provided by DeCoste.[18] In his analysis of the *Hyde* rule *vis-à-vis* the legal history of marriage, he notes that the "so-called rule in *Hyde* is no rule at all, simply because what the Court is about in *Hyde*, and expressly so, is *not* prescription,

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[17] *Halpern*, *supra* note 10 at para. 53.

[18] *Supra* note 16.

but recognition."[19] Marriage is an age-long social institution existing prior to *Hyde*, the Canadian state and the *Charter*. Marriage is defined and characterized by different sex unions, and it is in that form that it came to be recognized and protected by law. Thus, the *Halpern* Court,

> [b]y declaring 'irrelevant' '[t]he fact that the common law adopted, rather than invented, the opposite-sex feature of marriage'...erects a barrier between the social and the legal that, should it ever be passed, subordinates the social to the legal.[20]

This observation holds true notwithstanding the legal supervision or regulation of marriage by the state. Such regulation-pertaining to matters such as registration, matrimonial rights, and dissolution-does not tend to abolish the meaning and significance of marriage. Rather, state supervision, even at its extreme, has been more or less confined to affirming and protecting the marriage framework for the peaceful interaction of a distinct civil society. According to Coolidge,

> the state may legitimately regulate marriage...[but] its laws [must] reflect a respect for marriage's distinctive institutional characteristics. Marriage as a moral reality should ground the regulation of marriage as a legal reality. The *moral* [natural and institutional] *law* of

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[19] *Ibid.* at 623 [emphasis in original].

[20] *Ibid.* at 624-25 [footnotes omitted].

> marriage should be reflected in the *positive laws* enacted to guarantee rights of institutional access, interpersonal association, and individual liberty. The state should structure the law of marriage so that it supports the institution of marriage--whether through enabling, intervening, or substituting activities, as circumstances may require.[21]

By failing to acknowledge the extra-legal roots of the marriage institution, the Court arrogated to itself a power which would not be available to it otherwise, that is, the power to manage and alter the institution. Had the Court considered marriage to be a social institution that predates law and the liberal state, it would have found it imperative to examine its jurisdiction, if any, to decree a fundamental change in the nature of marriage. Such an examination, for reasons which I will make clear subsequently, would have led to the finding that redefining marriage is in excess of its jurisdiction.

Instead, having reduced marriage to a legal artefact, the Court proceeded to dismantle it most important characteristic, namely, the union of two members of the opposite sex. This is most apparent in the Court's analysis of the purposes of marriage. The Court

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[21] David Orgon Coolidge, "Same-Sex Marriage? *Baehr v. Miike* and the Meaning of Marriage" (1997) 38 S. Tex. L. Rev. 1 at 57 [emphasis in original].

erroneously accepted the Attorney General's view that one of the specific purposes of marriage is to unite the opposite sexes.[22] The Court then declared that this purpose is "contrary to the values of a free and democratic society"[23] because it favours one form of relationship over another, and "demeans the dignity of same-sex couples."[24] However, contrary to the Attorney General's and the Court's views, unifying oppositely sexed couples is not a purpose of marriage, but rather, its primary feature, and the main reason why the institution exists. Thus,

> marriage as an institutional practice is deeply, irretrievably, and oppositely sexed, just because it *is* the practice of men and women uniting as husbands and wives. This is its nature precisely because of the nature of the statuses it bestows and not because of any function, procreation especially, that some may wish to associate with them.[25]

Similarly, it is submitted that a proper view of marriage can only be maintained by reference, first, to the oppositely sexed status of those who marry, and second, to other incidents which may be associated

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[22] The other purposes of marriage advanced by the Attorney General include procreation and companionship. See *Halpern*, *supra* note 10 at para. 118

[23] *Ibid.* at para. 119

[24] *Ibid.*

[25] DeCoste, *supra* note 16 at 625-26 [emphasis in original] [footnotes omitted].

with the institution. Marriage is thus, as Coolidge observes, "the social structure which embodies and governs"[26] a "total sexual community, meant to be *male-female*, monogamous, exclusive, and permanent."[27] Within the total sexual community, "*men and women*...make total commitments, give fully of themselves, nourish intimacy, and gift the world with children."[28]

As mentioned previously, the *Halpern* Court also found that the common law definition of marriage violated the equality rights of the couples under the *Charter*. The Court held that marriage draws a formal and discriminatory distinction between opposite-sex couples and same-sex couples on the basis of sexual orientation. However, the Court's finding on the equality issue was also wrought without any consideration of marriage as a social institution which uniquely applies to opposite-sex couples. Coolidge rejects a similar equality finding in his analysis of the issue of sex discrimination against same-sex couples. According to him, a court faced with the

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[26] *Supra* note 21 at 51.

[27] *Ibid.* at 55 [emphasis added].

[28] *Ibid.* at 53 [emphasis added].

interpretation of an equality right, particularly where sex discrimination is involved, ought to distinguish between individual and institutional classifications of equality. Thus, "a law that distinguishes between individual men and women is not the same as a law that recognizes an institution that includes both men and women."[29] Also, "sexual difference is relevant in some kinds of institutions, but not in others...it is fundamental to the definition of marriage--but it is irrelevant to the definition of a corporation or a government."[30] Equality laws can only be correctly construed "in a more subtle and constructive fashion if it acknowledges these two distinctions."[31] Where the equality right concerns an institutional practice, there is duty placed on the court to explore "whether the practice is deeply rooted in traditions of the nation that are essential to the preservation of our system of ordered liberty."[32] This involves, "essentially[,] historical[ ]inquiries into the common law tradition."[33] When applied to marriage, this inquiry reveals that "[c]onsistently in

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[29] Coolidge, *supra* note 21 at 77.

[30] *Ibid.*

[31] *Ibid.* at 78 [footnotes omitted].

[32] Lynn D. Wardle, "A Critical Analysis of Constitutional Claims for Same-Sex Marriage" (1996) 1996 B.Y.U.L. Rev. 1 at 33 [footnotes omitted].

[33] *Ibid.*

our legal tradition, the very nature and essential meaning of marriage is heterosexual."[34] DeCoste argues similarly that the sexed nature of marriage does not offend equality because the office of marriage "as constituted by cultural practice and recognized at law, are oppositely sexed offices."[35] Therefore, to declare such cultural practice as "diseased and sectarian"[36] on the ground of equality is a "costly…declaration concerning the sovereignty of the state over the whole of social life, its history, and the future of its practices."[37]

Some commentators on the *Halpern* case suggest that the issues in this case fall more properly to Parliament and that the Court should have allowed Parliament some time to consider changing the

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[34] *Ibid.* at 38. A similar argument put forward by the Attorney General was rejected by the Court. In the Attorney General's view, marriage does not distinguish between opposite-sex and same-sex couples because it

> is a descriptor of a unique opposite-sex bond that is common across different times, cultures and religions as a virtually universal norm. Marriage is not a common law concept; rather, it is a historical and worldwide institution that pre-dates our legal framework.

Halpern supra note 10 at para. 66.

[35] *Supra* note 16 at 631 [footnotes omitted].

[36] *Ibid.* at 632.

[37] *Ibid.*

common law rule.[38] However, it is doubtful whether any legislature has the power to reconstruct basic social values without abusing its powers in the manner the *Halpern* Court did.[39] Several routes exist to according same-sex couples with rights peculiar to unions of that kind without altering institutions existing prior to and independent from the state and the *Charter*.

Those who celebrate *Halpern* as a victory for equality and gay rights overlook the more significant danger the decision poses to Canada's liberal democracy and liberal statecraft. Recently, Canada's 1,100 federally appointed judges requested a 17 percent salary increase to compensate for what they considered to be their increasing role in settling bitter and controversial social issues. Appearing before Canada's independent Judicial Salary and Benefits Commission, Mr. Pierre Bienvenu, a lawyer for the judges, is reported to have justified the increase on the ground that "government does not hesitate to

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[38] See e.g. McLeod, *supra* note 16.

[39] Coolidge agrees. According to him, "any constitutional regime that would arrogate to itself the power to redefine marriage or marital status would jeopardize its moral legitimacy. Law either does justice to the reality of marriage, or does not, and can be evaluated as such." *Supra* note 21 at 89.

leave the most divisive societal issues for determination by the courts."[40] As an example of the increasing responsibilities of judges in such social advocacy, Mr. Bienvenu cited the role played the Canadian judiciary in cases such as *Halpern* and *Egale*.[41] Thus, the Canadian judiciary seeks to be compensated, in monetary terms, for fundamental excesses of judicial powers, excesses which interfere with the liberal lifeworld and the proper conduct of state office. The request for a raise by the judges is not just an acknowledgement of their new found role as 'social engineers';[42] it also implies a commitment and resolution to further action of the same sort. In *Halpern*, the Court solidified a growing interest by the Canadian state in reordering social institutions and intruding in matters outside the scope of governmental powers. Boundaries between the liberal state and civil society, on one hand, and boundaries between

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[40] See Janice Tibbetts, "Judges Blame Ottawa for Pay Hike Demand" *National Post* (4 February 2004) A4.

[41] See *ibid.*

[42] The use of the terms 'social engineers' or 'social engineering' in this essay is borrowed from DeCoste. According to him, social engineering occurs "[w]hen a state exceeds the boundaries that define its proper relationship to civil society, when it forsakes affirmation and instead takes the institutions and practices of civil society as objects subject to its legislative or curial surveillance or reform." *Supra* note 16 at 635.

the state, civil society and the individual, on the other hand, are seminal to liberal political and legal theory and practice. These boundaries are drawn specifically to uphold the rule of law, and secure the commitment of a minimal state to vindicating "individual rights by protecting against aggressors internal and external"[43] to the state. The state has no business according social recognition to its citizens or changing social practices in the name of granting equality of status to groups or lifestyles of which it approves. Its primary responsibility is to preserve individual rights, and protect persons from harmful interference by the state, other persons, and institutions of societal life. By using its power to reconstruct social practices and ensure social harmony, the liberal state not only exceeds its institutional commitments, but directly interferes with those individual rights it exists to protect. The state is entitled to intrude in social life where, and only where, necessary to prevent practices that violate individual rights or "[compromise] the liberal credentials of the state and so its continuance as a liberal state."[44]

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[43] Lomasky, *supra* note 1.

[44] DeCoste, *supra* note 16 at 635.

Furthermore, in liberal states, the law defines and regulates political morality, or otherwise put, the institutional structure and authoritative limits of government. Liberal political morality is concerned with the constitution and organization of political institutions, and the relationship between these institutions and the governed. Only the latter will concern us here, and this is because a proper view of this relationship excludes state action of the sort displayed in *Halpern*. Precisely stated, it is contrary to liberal political morality for the state to engage in transforming the traditions, cultures, and practices of an independent civil society.[45]

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[45] Conversely, the state cannot submit to colonization by civil society. Thus, a liberal state must avoid attempts by any institution of civil society to colonize its laws and state power through the advancement of comprehensive doctrines. The phrase "comprehensive doctrines" is used here and elsewhere in this essay, in the manner defined by Rawls, to mean "conceptions of what is of value in human life, ideals of personal virtue and character that are to inform our thought and conduct as a whole." John Rawls, "The Idea of an Overlapping Consensus" (1987) 7 Oxford J. Legal Stud. 1 at 6. The position of the liberal state as regards comprehensive doctrines of civil society will be examined in more detail in Chapter 3.

1.3 Thesis

So far I have given some examples to show that the current relationship between the liberal state and civil society is flawed and that traditional boundaries no longer exist. In my view, the Canadian judiciary is leading an illiberal colonization of civil society by the state. The Canadian state is not only forsaking its liberal identity, but its "liberal statements are no longer centered on the merits of distributed powers, the need to protect traditional civil society from an encroaching state, or bourgeois moral standards."[46] It is my thesis in this essay that the current relationship between the liberal state and civil society falls short of the norms of liberal political morality. My purpose therefore, is to offer a normative view of the relationship, in liberal states, between law, the state and civil society. I will propose that this relationship subsists mainly in the separation of the state from an independent civil society and deference by the state to the institutions, traditions and practices of civil society, save where interference is necessary to prevent and punish the

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[46] Paul Edward Gottfried, *After Liberalism: Mass Democracy in the Managerial State* (Princeton, New Jersey: Princeton University Press, 1999) at ix.

infringement of individual rights.[47] I shall also argue that this proposition is embodied in a liberal view of civil society and coincides with principles integral to liberal political morality including the rule of law and separation of powers. In support of this argument, I will explore and elaborate on the liberal understanding of civil society and political morality and the connection between them.

In the second chapter, I will explore in more detail the liberal view of civil society. I will undertake a review of political theory which shaped the ideals of civil society in the liberal world, including Martin Luther's thesis on the Two Kingdoms, Hegel's classification of the ethical spheres of human association, and Locke's views on separation of a limited state from a private sphere of property. The chapter will conclude with an examination of the purpose served by a separate civil society in liberal states. The aim of the chapter is to establish that liberal civil society is an independent, self-ordering,

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[47] DeCoste notes wisely that "[t]hrough this deference, the liberal state at once affirms its own limitations and the ordinary lives led by those who, in their capacity as citizens, are its subjects." *Supra* note 16 at 635.

social sphere distinct from the state, that it is populated by rights-bearing persons, that it is an arena which nurtures voluntary association among persons, and that it embodies and protects the practices, cultures and traditions of persons.

In the third chapter, I will attempt to locate our view of civil society within liberal political morality. I will begin by examining the meaning and extent of liberal political morality, and its normative demands on political power and social life. I will argue that liberal political morality is shaped mainly by an appeal to the concepts of rule of law and separation of powers. Relying on the scholarship of Montesquieu, Rawls, and Dicey, amongst others, I will show how both concepts direct state action with regard to civil society.

In a brief conclusion, I shall summarize the various positions taken in the entire essay which are definitive of the normative relationship between the liberal state and civil society. I shall also situate the importance of this relationship to the legal and political culture of liberal democratic states. Finally, I shall propose what government

officials need to do in order to affirm their understanding of their place and power with regard to civil society.

CHAPTER TWO

LIBERALISM AND THE CONCEPT OF CIVIL SOCIETY

2.1. Introduction

My goal in this chapter is to present a liberal view of civil society through an analysis of political and legal theory. As we shall see shortly, the concept of civil society is understood and interpreted differently within and outside the liberal tradition. However, the focus here would be to highlight only the important ideas which are at the core of a liberal concept of civil society, and which continue to provide support for the liberal view.[48] This will involve an examination of three things, namely, how and from what sources the liberal view of civil society evolved, the scope of liberal civil society, and the purpose served by civil society in the liberal state.

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[48] For a general and comprehensive discussion of political theory on the concept of civil society, see John Ehrenberg, *Civil Society: The Critical History of an Idea* (New York: New York University Press, 1999).

2.2. The Evolution of the Liberal View of Civil Society

The concept of civil society is as fluid as its history. Following its first significant use during the Greek classical era, particularly in the writings of Plato, scholars and political theorists have employed the concept in various ways to explain social and political relations, and the relationship between public and private spheres of life. Different notions of civil society have evolved with changes in political thought,[49] depending mostly on the existing orthodoxy at any period in political history. However, three significant understandings of the concept have been influential in organizing political thought about civil society, namely, civil society as a universal political commonwealth, as a religious commonwealth, or as an autonomous social sphere distinct from politics and the Church. While the first two conceptions deal with the organization of all spheres of life

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[49] According to John Ehrenberg, "Civil society...has long provided a fruitful vantage-point from which to evaluate the central categories of political thought." *Ibid.* at x. For a comparative review of the meaning of civil society within various political traditions, see John Keane, ed., *Civil Society and the State: New European Perspectives* (London: Verso, 1988), Simone Chambers & Will Kymlicka. eds., *supra* note 1, Nancy L. Rosenblum & Robert C. Post, eds., *Civil Society and Government* (Princeton, NJ: Princeton University Press, 2002).

under a strong state and universal church respectively, the third describes civil society as a private sphere populated by free self-interested individuals.

In reacting to the perceived threat of private interest to an effectively organized Greek nation-state, Plato fused the public and private elements of society into a moral community that "can be comprehended only in relation to the organizing principles of the state."[50] Plato's civil society was a politically controlled realm comprised of individuals who "lived in different spheres of association,"[51] but require the civilizing force of a strong state to "counteract the centrifugal force of diversity...[and] root civil society in an ethical totality."[52] The union of all associations into one coherent political whole provided the only means of averting the anomies brought on by private interests, and the consequent disintegration of society. Plato's unitary community would only

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[50] Ehrenberg, *ibid.* at 4.

[51] *Ibid.* at 5.

[52] *Ibid.* at 7.

survive by advancing the common good, which is analogous to political good, and by the elimination of private interests.

Other classical philosophers, notably Aristotle, did not agree with Plato's view on the peril of private interests. Aristotle held that no ends would be served by the elimination of private interests, because "[p]rivate concerns are not, in and of themselves, fatally corrosive of public life."[53] Instead, "[a]n 'excess of self-love' is the problem, and the solution is not to eliminate the natural human desire for privacy but to civilize it through education and turn it toward the public good."[54] Civil society was therefore "the politically constituted community that organized separate spheres of life in the state and, in the process, permitted them to express the full measure of their limited ethical potential."[55] Aristotle is important to the liberal discourse on civil society because it was he who first clearly articulated the distinction between the private and the public, between the life of the active citizen in his household and his life in

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[53] *Ibid.* at 15.

[54] *Ibid.*

[55] *Ibid.* at 18.

the *polis*. Aristotle refuted Plato's contention that the good of the republic lay in the total union of the *polis* by his theory of the mixed state--a state where citizens are engaged not only in political association, but also in family life and in pursuit and ownership of private property. The mixed state was not a total unity, but an amalgam of separate unities, whether in the household or in the *polis*. In Aristotle's view, there is a primary union "of those who cannot exist without each other; namely, of male and female, that the race may continue,"[56] and out of which arises natural association in the family "for the supply of men's everyday wants."[57] The unity of several families gives rise to villages, and "[w]hen several villages are united in a single complete community, large enough to be nearly or quite self-sufficing, the state comes into existence."[58] The state is not concerned with the private existence of each individual; rather, it "continu[es] in existence for the sake of a good life,"[59] which, in Aristotelian terms, is coterminous with political life or

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[56] Stephen Everson, ed., *Aristotle: The Politics and the Constitution of Athens*, rev. student ed. (Cambridge: Cambridge University Press, 1996) 12.

[57] *Ibid.* Ehrenberg describes the unities of the individual and households (families) as "unitary moral phenomena" *Supra* note 48 at 14.

[58] Everson, *ibid.* at 13.

[59] *Ibid.*

political good. As Ehrenberg puts it, Aristotle's state "is the only category within which the public life of citizens outside the family can be comprehended."[60] However, Aristotle also identified a "private sphere of necessity and particularity,"[61] which existed apart from the state, where individuals expressed their interests primarily for their own sake, not for the sake of the common/political good.

Despite disagreements over the constituent spheres, the thrust of classical theory on civil society remained the universal *polis* throughout the Greek and Roman periods. Things however changed with the advent of Christianity. Christian thought, led by the work of St. Augustine, replaced political unity and organization with the rule of God through the agency of the Church. Medieval philosophers were suspicious of human ability to "draw moral values"[62] required for ethical association in the worldly state, whether by reason or conscious action, and instead located the redemption of a sinful civil society in the transcendent power and virtue of God. Under the

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[60] Ehrenberg, *supra* note 48 at 14.

[61] *Ibid.* at 15.

[62] *Ibid.* at 31.

Christian commonwealth, the state continued to exist, although its primary tasks were "to protect institutions that have no independent moral standing but are necessary for civilized human life...[and] helping the Church exercise its teaching, converting, and saving ministry."[63] The universality of the Christian commonwealth meant that no allowance could be made on earth for the sinfulness, blasphemy and immorality borne of reason or human association. Christian doctrine emphasized faith in and total obedience to ecclesiastic authority, matters which were antithetical to the self-interested forces operating in civil society. As we shall soon discover, the principles of Christian universalism are of minimal moment or application to the task of conceptualizing a liberal view of civil society. Whatever continued influence medieval Christian universalism has over modern conceptions of civil society is mainly a feature of the illiberal traditions existing in tightly-knit religious communities or states.[64] However, some restatements of and attacks

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[63] *Ibid.* at 35.

[64] It suffices to make clear that medieval Christianity may or may not have *directly* influenced political traditions in all such communities or states. In any case, the fact of such direct influence is irrelevant here. What matters more is that benchmarks of Christian universalism--including the absence of separate state or

on Christian universalism by medieval and post-medieval philosophers are significant in establishing the sources from which the liberal view of civil society evolved.

A notable restatement of the notion of a universal Christian commonwealth was advanced by Pope Gelasius I and the Patristic writers of the medieval era through the theory of the "two swords" or the two powers which ruled the world--the Pope/Church as overseers of spiritual interest and matters of salvation, and the Emperor/civil government concerned with "temporal matters of order, peace, and justice."[65] Gelasius and his peers whittled down the universality of ecclesiastical power on earth and elevated the state from a mere agent of the Church to a separate sphere of societal life. However, Gelasianism did not produce a separate theory of civil

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civil society, an all-powerful and insular religious group, the negation of individual autonomy and rights--are still traditional in some states today. In such states, these traditions have often been used to control law and the state. For example, in 2000, certain states in Northern Nigeria replaced the existing penal laws with the Sharia, a code based on comprehensive Islamic doctrines. The code has further polarized the multi-religious Nigerian state and its enactment threatens the secular status of law and power in Nigeria.

[65] Ehrenberg, *supra* note 48 at 39.

society and in the manner of the times, civil society continued to be regarded as intrinsic to a single Christian commonwealth.[66] The Gelasian separation of Church and state is however crucial because it highlights and supports a relevant historical fact in the development of the state and civil society, namely, that the state is distinct from and not inclusive of either a self-organizing or otherwise organized civil society.

After Gelasianism and medieval theory, the concept of universalism, whether Christian or political, lost some of its appeal in political theory. This paved the way for theorists to propose, not only the clear separation of the Church from the state, but also the separation of the state from civil society. For our purpose here, the most significant of these theorists is Martin Luther. Luther's attack on the authority of the universal Church and his preference for the liberated individual conscience solidified the existence of an "unassailable

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[66] As stated by Ehrenberg, "[p]olitics, economics, science, ethics, and art remained under the controlling influence of theology, and no independent developments in these areas would be possible until the Reformation and the Renaissance broke the unity of medieval Christian thought." *Ibid.* at 39-40.

sphere of private life."[67] In his view, man's free conscience was in direct relationship with God, his maker. Therefore, "[n]either popes, sacraments, laws, nor priests were necessary for salvation."[68] Luther claimed that the individual conscience and freedom were beyond the reach of ecclesiastical affirmation; rather, man's conscience put him in direct contact with God, the focus of his faith. The Christian community was a "community composed of free, equal and autonomous consciences"[69] united under one faith and sacrament. All Christians, whether priests, laity or princes (rulers of the state) were equal in conscience, though each had a different role in the united Christian community.[70] Focused on dismantling the elaborate power of the medieval Church, Luther insisted on the separation of Church and state and the equalization of powers between them (thus allowing the prince to act as a check on the pope and vice versa). The role of the Lutheran prince also extended to defending civil society--

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[67] *Ibid.* at 62.

[68] *Ibid.* at 63.

[69] *Ibid.* at 65.

[70] Luther's "differentiated civil society…[did] not touch the equality of believers." *Ibid.*

the "external relations of equal believers united in faith"[71]--from the power of the Church. According to Luther, the prince is better suited to the purification of the Church and defence of civil society because he wields the sword, the symbol of worldly power. However, Luther's support for earthly authority was not absolutist in nature. The role of the prince was confined to "protecting life, property, and other requirements of earthly life,"[72] but did not extend to interfering with individual thought and action. Thus,

> Luther's theory of government...came down to this: temporal authority could insure outward peace for the true believer; it could never affect his internal virtue. For the unbeliever, government could impose external order and external virtue. Government existed 'in order that the good may have outward peace and protection; and that the wicked may not be free to do evil, without fear, in peace and quietness'.[73]

By allowing the individual "a sphere of autonomy such as he had never known in medieval society,"[74] Luther secularized civil society

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[71] *Ibid.* at 66.

[72] *Ibid.* at 69.

[73] Sheldon S. Wolin, "Politics and Religion: Luther's Simplistic Imperative" (1956) 50 American Political Science Review 24 at 39 [citing Charles M. Jacobs, ed., *The Works of Martin Luther* (Philadelphia: Muhlenberg Press, 1932) vol. 6 at 460].

[74] John H. Hallowell, *The Moral Foundation of Democracy* (Chicago: The University of Chicago Press, 1954) 69.

and theorized its separation from political society.[75] Hallowell, commenting on the "impersonalization of the political order"[76] in pre-modern society, notes that

> [t]his sphere [of individual autonomy], which now corresponded to 'society', was set apart from the impersonal, public, political order, which was the 'state.' The medieval problem of the relationship between ecclesiastical and secular authority was never solved but was replaced in immediate importance by the problem of the relationship between the state and society, between the spheres of political authority and individual autonomy. Liberalism emerged as a specific answer to this problem.[77]

In summary, it was Luther who first clearly articulated two relevant features of the liberal concept of civil society, namely, the separation of church and state, and the separation of state from civil society.

Despite Luther's advocacy for the liberated individual conscience, the notion that civil society is organized and validated by a higher force (be it the state or the Church) maintained canonical influence

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[75] Hallowell does not specifically mention Luther's role in the emergence of a sphere of individual autonomy. However, I am of the view that the existence of such a sphere was solidified by Luther's theory of government.

[76] Hallowell, *supra* note 74.

[77] *Ibid.*

over Enlightenment[78] and modern thought until Hegel decisively severed civil society from the state and theorized the family, state and civil society as "different structures of ethical development, [constituted by] separate and related moments of freedom in which individual self-determination is realized in larger ethical communities within which free persons make moral choices."[79] It was Hegel who placed civil society between the family (the natural component of ethical association), and the state ("the objective and necessary ethical sphere that is independent of all subjective wants, the inclusive sphere of conscious choice that transcends the family's biologic accident and civil society's arbitrary self-interest").[80] Civil society was a system of needs where self-interested and free individuals mutually depend on one another, through social and market relations, in an attempt to satisfy infinite needs. Hegel paved the way for the contemporary conception of civil society as an independent self-organizing sphere of action and association distinct

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[78] Enlightenment theories revolved largely around rejections and endorsements of the classical and medieval understandings, with occasional forays into the role of property and economics in social relations. See Ehrenberg, *supra* note 48 at 55-80.

[79] *Ibid.* at 124.

[80] *Ibid.* at 131.

from the ordering influence of an external power. However, the particularity of interests in civil society produces "fatal extremes of wealth and poverty,"[81] and limits the ethical potential of a separate civil society. Civil society is shared between a few wealthy people and a "rabble of paupers,"[82] thus causing the latter group to "receive the[ir] means of livelihood directly from other public sources of wealth...not by means of their work"[83] or to take work which reduces them to mere producers of that which they cannot consume. The condition of poverty limits individual freedom because it "violate[s] the principle of civil society and the feeling of individual independence and self-respect in its individual members."[84] This limitation necessitates Hegel's state, which, echoing the universal *polis* of classical theory, arises out "of the very logic of civil society"[85] to complete the ethical development of civil society "precisely because it stands as the living negation of civil society's antagonistic

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[81] *Ibid.* at 127.

[82] G. W. F. Hegel, *The Philosophy of Right*, trans. by T.M Knox (Oxford: Oxford University Press, 1967) at para. 244 [translator's notes omitted].

[83] *Ibid.* at para. 245.

[84] *Ibid.*

[85] Ehrenberg, *supra* note 48 at 129.

chaos."[86] Hegel's state was therefore necessary not just to enforce peace and order, or protect rights, but also to civilize individual interests and counteract the divisiveness of civil society. The state does the latter by providing an arena where "conscious public duty"[87] would turn individual egoism towards "serv[ing] universality and freedom."[88] However, Hegel's state did not operate as the *only* existential necessity; it augmented a distinct civil society which operated on its own solid logic. In Hegel's words,

> [t]he state is the actuality of concrete freedom. But concrete freedom consists in this, that personal individuality and its particular interests not only achieve their complete development and gain explicit recognition for their right (as they do *in the sphere of the family and civil society*) but, for one thing, they also pass over *of their own accord* into the interest of the universal, and, for one thing, they know and will the universal; they even recognize it as their own substantive mind; they take it as their end and aim and are active in its pursuit. The result is that the universal does not prevail or achieve completion except along with particular interests and through the cooperation of particular knowing and willing; and individuals likewise do not live as private persons for their own ends alone, but in the very act of willing these they will

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[86] *Ibid.*

[87] *Ibid.* at 131.

[88] *Ibid.* As Hegel puts it, the strength of the state lies partly "in the fact that individuals have duties to the state in proportion as they have rights against it." Hegel, *supra* note 82 at para. 261.

> the universal in the light of the universal, and their activity is consciously aimed at none but the universal end.[89]

It is easy to see from the foregoing how Hegel is an important forbearer to the two political traditions of modern times, liberalism and communism. Both traditions emphasize, or overemphasize, various aspects of the Hegelian thesis. On the one hand, liberals endorse Hegel's distinction of ethical spheres, and agree with Hegel that individuality and personal accord is necessary for freedom. Liberal political institutions recognize and support this view of freedom. On the other hand, the communist theory of state and civil society adopts Hegel's concept of duty and ethical civility. Hegel's invitation to the state to attenuate economic inequality and its effect on liberty in civil society may well have had a direct influence on the communist use of the state as an ultimately expendable but necessary tool for ridding civil society of its unethical elements.

Another important contributor to the liberal discourse on civil society is John Locke. The liberal concept of civil society fully

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[89] *Ibid.* at para. 260 [emphasis added].

evolved with Locke's distinction of the public sphere from the private sphere. Locke conceived of each as separate self-organizing spheres. The private sphere is organized by the material processes of social life and rested on the ownership of property backed by "prepoliti:al natural rights"[90] (otherwise called 'civil rights'). These natural rights command that individuals be left alone to guard their interests and determine their economic fortunes in peace. Locke's economic sphere of property and rights existed in the state of nature and prior to the state, and must be "theorized apart from the enforcement power of the state."[91] Locke's private sphere was also an arena of competition because it was populated by individuals who were continuously battling over the acquisition of property and the satisfaction of selfish needs.

In Locke's view, the function of the state was to protect individual interests[92] and ensure healthy competition among the property

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[90] Ehrenberg, *supra* note 48 at 84.

[91] *Ibid.*

[92] "The great and *chief end*...of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property.*" See Peter

holders of the private sphere/civil society. Ehrenberg notes that by emphasizing that governments exist to protect the economic or material processes of private life, "Locke took an important step away from the ancient claim that politics stood at the center of social organization,"[93] and by so doing, launched the historical moment for the "limited liberal state and rule of law [which] would make it possible for rights-bearing individuals to pursue their competing interests without having to kill one another."[94]

To summarize, the foregoing theoretical concepts of civil society give rise to certain discursive benchmarks in liberal theory which will be defended throughout this essay, namely, the distinctiveness and diversity of civil society, the autonomy and particularity of its constituent denizens, and the separation of state from civil society.

Laslett, ed., *John Locke: Two Treatises of Government* (Cambridge, UK: Cambridge University Press, 1988) at 350-51 [emphasis in original].

[93] Ehrenberg, *supra* note 48 at 88.

[94] *Ibid.*

2.3. The Province of Liberal Civil Society

Liberals continue to view civil society as separate from the state and essentially inclusive of all that is non-governmental. According to Steven Scalet and David Schmidtz, liberal civil society

> refer[s] to anything *but* government: businesses, schools, clubs, unions, media, churches, charities, libraries, and any other nongovernmental forms of organization through which a community's members relate to each other....It refers to a cluster of things that bear a family resemblance to each other but share no common essence, apart from being nongovernmental forms of association.[95]

Liberals also tend to associate civil society with private/social culture and the state with public culture. Rawls, elaborating on the framework of basic institutions of societal life and the "principles, standards, and precepts that apply to it,"[96] observes that "public culture comprises the political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary), as well as historic texts and documents that are

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[95] Steven Scalet & David Schmidtz, "State, Civil Society, and Classic Liberalism" in Rosenblum & Post, eds., *supra* note 49, 26 at 27 [emphasis in original].

[96] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 11.

common knowledge."[97] Public culture differs from the "culture of daily life"[98] which is comprised of "[c]omprehensive doctrines of all kinds--religious, philosophical, and moral."[99] The public sphere is therefore populated by government or some form of public rule, by officials who act politically to realize the common interests of individuals within the private sphere. The public and private spheres are generally subject to the allowances and restrictions of law, but government is an official institution guided by a regime of administrative rules of action and forms of discretion which are subject to scrutiny and sanction. In contrast, individuals in the private/social sphere are the products of their own will and generally exercise broader forms of discretion than obtains in the public sphere. It is arguable that social relationships also constrain individual discretion, and may in fact, as life in tightly-knit religious communities has shown us, leave little room for uncertainty in associational life. However, the practices of associational life and

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[97] *Ibid.* at 13-14.

[98] *Ibid.* at 14. He also refers to "culture of daily life" as the "culture of the social, not of the political" and more directly, "the 'background culture' of civil society." *Ibid.*

[99] *Ibid.*

more so the *bad* practices, are not constitutive of the norms of social association. It is merely a contingent matter because civil society

> possesses the potential for virtue or vice, is potentially progressive or regressive, and is potentially self-correcting or in need of outside correction....According to its most favourable descriptions, it is a space in which liberations are partial, utopias are relative, personal fulfillment is unfinished. On less favourable accounts, civil society is potentially subversive of social order, social justice, and/or individual well-being.[100]

Four conditions account, in my view, for liberal insistence on the separation of state and civil society. These include: (a) the belief that morally equal persons are the "constitutive force of civil society;"[101] (b) the distinction between personhood and citizenship and its relevance in advancing the "priority of persons;"[102] (c) the nurturing of voluntary association; (d) the role played by a self-ordering civil society in encountering stifling forms of governmental power. These

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[100] Richard B. Miller, "Overview: The Virtues and Vices of Civil Society" in Rosenblum & Post, eds., *supra* note 49, 370 at 370. This would justify the liberal inclusion of markets within civil society, despite the notion of markets as coercive, state-like institutions which, oftentimes, manipulate market forces to dominate and oppress.

[101] Ehrenberg, *supra* note 48 at 109.

[102] This phrase is adopted here in the context of its use by John Finnis. See John Finnis, "The Priority of Persons" in Jeremy Horder, ed., *Oxford Essays in Jurisprudence*, 4th series (Oxford: Oxford University Press, 2000) 1-15.

conditions do not just provide support for the notion that a distinct civil society is embedded in liberal theory; they coincide with normative concepts integral to liberal political morality and rule of law. I shall engage in showing the latter connection in the next chapter where I will argue that the separation of state and civil society is intrinsic to liberal political morality and definitive of how a liberal state should operate *vis-à-vis* civil society. For now, I shall briefly discuss the first three conditions enumerated above. To avoid repetition, I will hold off my discussion of the fourth condition because I will encounter it fully in my discussion of the purpose of civil society.

a. *Civil Society: Container of Moral Equals*

Liberals view civil society in the spirit of Luther's community of free, autonomous and equal persons. Individuals are "the primary moral unit within liberal theory"[103] and "[e]ach person stands in a unique relationship to those particular ends that are distinctively her

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[103] Lomasky, *supra* note 1 at 55.

own."[104] It follows therefore that like every discourse in the world of liberalism, "[t]he discourse of civil society begins not with the group but with the individual."[105] Individuals do not only enjoy the right to lead free private lives according to each person's respective design; their condition as regards one another in society is one of guaranteed "moral or 'natural' equality."[106] Equality in this regard connotes the kind of power implied by Lockean natural rights theory whereby individuals are not just equal by nature (based on the "presumption in favour of equal treatment, unless morally relevant grounds for treating people differently can be adduced")[107] but have the "'perfect equality' of power"[108] to pursue their personal interests and condition the circumstances of their participation in society. In another sense, individuals enjoy the "equal" liberty to lead private lives and engage in voluntary association in civil society.[109]

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[104] *Ibid.* at 56.

[105] Larry Siedentop, *Democracy in Europe* (London: Allen Lane, The Penguin Press) 57.

[106] *Ibid.*

[107] *Ibid.*

[108] Ehrenberg, *supra* note 48 at 85.

[109] Siedentop describes this principle of equality as "a moral principle...to which all can appeal." *Supra* note 105 at 59.

b. *Between Personhood and Citizenship*

One important consequence of Locke's influence on the evolution of a liberal view of civil society is that liberals see civil society as populated by free self-interested persons. A person's private life in civil society is different from his public life as a citizen of the state. In conceptualizing civil society, liberals therefore avoid the pre-individualist emphasis on the *exclusively* public or republican role of the individual within the *polis*, as was the case in classical theory.

Unlike Plato's citizen, whose life lay in the pursuit of the good of the commonwealth, the negation of his private interests, and in doing the 'public weal', the existence of the private, autonomous, rights-bearing person living primarily for his own sake is deeply entrenched in liberal culture. This view of personhood is necessary to protect and preserve fundamental human rights, such as liberty and equality, and is repeatedly emphasized judicially in liberal states. For example, in *Planned Parenthood of SouthEastern*

Pennsylvania v. Casey[110], the U.S Supreme Court was faced with the question of the constitutionality of legislation which raised issues similar to those in the famous case of *Roe v. Wade*[111], to wit, a woman's right to obtain an abortion before fetal viability without undue interference by the state. In reaching the conclusion that such interference was unconstitutional, the Court offered the following view of individual liberty:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of *personhood* were they formed under compulsion of the State.[112]

As regards citizenship, Larry Siedentop notes rightly that the discourse on citizenship is a product of the pre-individualist tradition which emphasizes "conduct [based on]...'civic virtue' or patriotism, [and] unlimited devotion to the welfare and glory of the city."[113] Citizenship is therefore not based upon the natural, autonomous, private, and differing moral motivations or pursuits of

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[110] 505 U.S. 833 (1992) [*Casey*].

[111] 410 U.S. 113 (1973).

[112] *Casey supra* note 110 at 851 [emphasis added].

[113] *Supra* note 105 at 53.

individuals; rather it recognizes and rewards those who are participants in the 'public weal.'[114] Also, some rewards enjoyed by citizens depend on the allowance of the state. This is not to say that modern citizens do not have private interests or fundamental rights; rather they have the added advantage, as opposed to non-citizens, of enjoying rights far above that which is common to all moral equals.[115]

This distinction between personhood and citizenship was recognized by the Canadian Supreme Court in *Andrews v. Law Society of British Columbia*.[116] The case involved a citizen of the United Kingdom permanently resident in Canada who wished to practise law in

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[114] According to Siedentop, "[t]he discourse of citizenship does not contain any principle of justice or of equity. In modern terms, therefore, this discourse does not have any moral content." *Ibid.* at 55.

[115] Siedentop remarks:

> Citizens are equal, but they preside over a society composed of their inferiors....In the discourse of citizenship, to be 'free' is to occupy a superior social rank, to enjoy the status of a citizen. To be free is to enjoy the privileges of citizenship, the privileges of attending the public assembly, speaking and voting. Freedom does not refer to rights enjoyed by all members of society equally.

Ibid.

[116] [1989] 1 S.C.R. 143 [*Andrews*].

British Columbia without first becoming a Canadian citizen as required by s. 42 of the *Barristers and Solicitors Act*.[117] He unsuccessfully sought a declaration from the lower court that the citizenship requirement violated s. 15 of the *Charter*. His appeal was allowed and the Law Society appealed to the Supreme Court. In deciding the issues on the appeal, the Court noted that

> [r]elative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated...Non- citizens, to take only the most obvious example, do not have the right to vote.[118]

The Court made another crucial distinction between citizenship and personhood, which is, that citizenship, being a political category, is largely inflexible and incapable of being affected by the conscious control of the individual. In the words of the Court,

> The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious

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[117] R.S.B.C. 1979, c. 26, as rep. by the *Legal Profession Act*, R.S.B.C. 1987, c. 25, s. 101, as re-en. by the *Legal Profession Act*, R.S.B.C. 1996, c. 255, as rep. by the *Legal Profession Act*, S.B.C. c. 9, s. 94.

[118] *Supra* note 116 at 152, Wilson J.

> action and in some cases not alterable except on the basis of unacceptable costs.[119]

Because civil society "is founded on the assumption of moral or 'natural' equality, creating a status which all human agents share as such, rather than as members of any particular society,"[120] membership of civil society is incompatible with the idea of citizenship. In civil society, the "pursuit of private ends is no longer treated with the contempt reserved for it by the discourse of citizenship."[121] What should matter to citizens and non-citizens in civil society is that they are persons, denizens of an equal, natural and moral space, and recipients of those "weighty claims in justice...which ought to govern our social and political arrangements."[122] Liberals frown at attempts to limit or manipulate these personal claims and as the decision in *Andrews* makes clear, Canadian courts will not hesitate to hold any limitation or violation of the equal concern and respect accorded to persons, whether or not they are citizens, as unjustifiably discriminatory under the *Charter*. In

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[119] *Ibid.* at 195, La Forest J.

[120] Siedentop, *supra* note 105 at 57.

[121] *Ibid.* at 58.

[122] *Ibid.* at 57.

finding that the citizenship requirement violated the respondent's rights to non-discrimination in *Andrews*, La Forrest J. highlights the implications of applying the strict categorization allowed by citizenship within social and political institutions as follows.

> There is no question that citizenship may, in some circumstances, be properly used as a defining characteristic for certain types of legitimate governmental objectives. I am sensitive to the fact that citizenship is a very special status that not only incorporates rights and duties but serves a highly important symbolic function as a badge identifying people as members of the Canadian polity. Nonetheless, it is, in general, irrelevant to the legitimate work of government in all but a limited number of areas. By and large, the use in legislation of citizenship as a basis for distinguishing between persons, here for the purpose of conditioning access to the practice of a profession, harbours the potential for undermining the essential or underlying values of a free and democratic society that are embodied in s. 15. Our nation has throughout its history drawn strength from the flow of people to our shores. Decisions unfairly premised on citizenship would be likely to 'inhibit the sense of those who are discriminated against that Canadian society is not free or democratic as far as they are concerned and...such persons are likely not to have faith in social and political institutions which enhance the participation of individuals and groups in society, or to have confidence that they can freely and without obstruction by the state pursue their and their families' hopes and

> expectations of vocational and personal development'.[123]

Another fundamental consequence of the deep roots of moral equality implied by personhood is that it rightly emphasizes the priority of persons over the social, legal, or political institutions of modern society. Whether these roots are founded in the pre-political, pre-societal "natural condition...of liberty and equality,"[124] or on what Siedentop refers to as "shared moral beliefs,"[125] i.e., the "consensus [reached by the early inhabitants of modern liberal states] over moral equality or equal liberty"[126] liberals agree that "the whole legal enterprise,"[127] and its "many orderings of human interaction and association which we call groups,"[128] is "for the sake of persons."[129] Also, where persons are prior, there association with one another is, as a matter of logic, prior to impersonal forms of

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[123] *Andrews, supra* note 116 at 196-97 [citing *Kask v. Shimizu*, [1986] 4 W.W.R. 154 at 161 (Alta. Q.B.), McDonald J.

[124] Lomasky, *supra* note 1 at 52.

[125] Siedentop, *supra* note 105 at 10.

[126] *Ibid.* at 14.

[127] Finnis, *supra* note at 102 at 8.

[128] *Ibid.* at 9-10 [footnotes omitted].

[129] *Ibid.* at 8.

association such as political association. In this sense, liberal civil society is not just distinct from the state; it is prior to the state.

The notion of such priority was first implied by Aristotle whose mixed state, Ehrenberg notes, was "based on the unitary household, just as the public rested on the private and the general was rooted in the particular."[130] Aristotle begins his *Politics*, with an examination of the natural and social relations that precede the coming into existence of the state. According to him, the primary stage is the relations between male and female persons, out of which arises the family. Several families constitute the village[131] and several villages eventually lead to the existence of the state. By this, Aristotle's rightly discloses the priority of relations in the formation of societies, one which proceeds from lives of individuals in civil society, from birth to education, from social interaction to professional occupation and so forth, and culminates in political association. Indeed, political

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[130] Ehrenberg, *supra* note 48 at 15.

[131] "But when several families are united, and the association aims at something more than the supply of daily needs, the first society to be formed is the village. And the most natural form of the village appears to be that of a colony from the family, composed of the children and grandchildren." Everson, *supra* note 56.

association *largely* exists for the sake of those individuals who reside at the soul of the state and for whose sake the state is engaged in those relations with which it is associated. Nonetheless, Aristotle did not arrive at this conclusion. In his view, "the state is by nature clearly prior to the family and the individual."[132] This conclusion does not seem logical in the light of the nature to politics progression, but it is one which is traceable to Aristotle's republicanism which held the individual and all earlier social forms and relations as *mere parts* in the natural process of the growth of the state. The state is the highest order in the nature of things because, by Aristotle's reasoning elsewhere, "[t]hat which is growing is...passing from something towards something, and what is produced in the process of growth is that towards which, not that from which, the growing thing is passing."[133] Thus, the individual, family and village were, by Aristotle's teleological deduction, the means to the only allowable end, that which exists for the sake of the good life, which is the state. It is doubtful if Aristotle's conclusion can be justified without a theory of the powerful state akin to that

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[132] *Ibid.* at 13.

[133] W. D. Ross, ed., *Aristotle's Physics*, (Oxford: Clarendon Press, 1998) 350.

which occupied classical republicans. In contemporary terms (at least to liberals), the separation of individual, social association and politics means that each is a means and end to itself, and while degrees of confluence between categories can be allowed, it does not stand to reason that the purpose of individuals and the associations they keep is for the edification of the state. However, if one discards Aristotle's conclusion, his notion of the progression of things is indeed the first implied articulation of the priority of the individual and social life over politics.

The priority of social life over politics is also traceable to Locke's thesis that private interests and the rights which protect them arise from and are present in the pre-political state of nature.[134] The state of nature is stateless but it is governed by natural law. Natural law provides a "complete and self-sufficient system of rights."[135] If civil society is constitutive of these private interests and rights, it is by reason of this anterior to the state. Because private interests are

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[134] "Freedom, labor, exchange and property were present in the state of nature, and this allowed Locke to derive civil society from a sphere of human action that existed before the state." Ehrenberg, *supra* note 48 at 85.

[135] *Ibid.* at 86.

accompanied by destructive elements, the state became necessary to "ma[k]e civilization possible by establishing an enforcement mechanism that could overcome the anarchical pull of individual interest."[136]

Furthermore, some aspects of the historical development of civil society and the state in notable liberal states, such as the United States of America, significantly endorse the priority of social life over politics. The institutions and practices of the American civil society and state grew largely from what Larry Siedentop calls the "habit of local self-government"[137] or "local liberty"[138] which was brought to America by the first settlers from England. The local liberty of the early settlers gave rise to "[s]elf-reliance and the habit of association"[139] which became the defining ethos of American civil society and so profoundly impressed Tocqueville during his American sojourn. The social conditions of American civil society became formalized by the founding fathers in the American

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[136] *Ibid.*

[137] Siedentop, *supra* note 105 at 11.

[138] *Ibid.*

[139] *Ibid.*

constitution and federal state, and were incorporated into its peculiar brand of liberal politics.

c. *Voluntary Association*

The fact that liberals accord primary value to the rights of autonomous individuals does not mean that liberal theory does not support association among individuals, or that its support does *in fact* have anything to do with the formation or existence of social associations. Individuals are naturally sociable and "no less for liberals than for Aristotelians and communitarians, human beings are social animals."[140] Liberals, however, conceive of social association as ancillary to the individual condition of autonomy and free choice. Put precisely by Cohen and Arato,

> rights do not only secure negative liberty, the autonomy of private, disconnected individuals. They also secure the autonomous (freed from state control) *communicative interaction* of individuals with one another in...civil society.[141]

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[140] Lomasky, *supra* note 1 at 53.

[141] Jean L. Cohen & Andrew Arato, *Civil Society and Political Theory* (Cambridge, Massachusetts: The MIT Press, 1992) 22 [emphasis in original].

Individual freedom leads to voluntary association. Voluntary association means the right to choose to enter, remain and exit from any and all associations, although liberal discourse generally privileges the discretionary right to remain and exit over the right of entry.[142] Civil sociability is therefore conditioned by individual autonomy and the freedom to choose.[143] Put otherwise by John Finnis,

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[142] Thus liberals regard institutions such as the family as part of civil society despite the involuntary nature of entry into such institutions. All that is necessary is that continued allegiance to such institutions is discretionary. Besides, legally recognised modes of family membership available today allow entry by choice, as in the case of adoptees. Lomasky sums up the liberal view as follows.

> A life apart from a nexus of associations may be stultifyingly miserable, but it is up to individuals to decide with which societies they will affiliate. This holds true even for relationships originally unchosen, such as the primal unit of the family, as well as ethnos and nationality. Although these [affiliations] are not established *ab initio* through acts of choice, their centrality or lack of same in one's ongoing projects is a determination that devolves on individuals, not the discretion of collectives in which they find themselves. Most people will find their lives enriched through family or communal ties, but some will not; the latter are at liberty to detach themselves from these associations and seek others that are more fulfilling.

Supra note 1 at 53.

[143] In this regard, Palmer observes that "[i]ndividuality and personal liberty developed along with civil society." Tom G. Palmer, "Classic Liberalism and Civil Society: Definitions, History, and Relations" in Rosenblum & Post, eds., *supra* note 49, 48 at 53. Similarly, Antony Black notes that civil society is "the beneficiary of the enhanced value...ascribed to the individual." Antony Black, *Guilds and Civil*

> the reality of a group is the reality of an order of human, truly personal acts, an order brought into being and maintained by the choices (and dispositions to choose, and responses to choices) *of persons*. A group's act is defined by its 'public' proposal--i.e. by the form in which it is proposed to members of the group, for them to participate in or not. Social acts, though irreducible to the acts of people in the acting group, are constituted exclusively by those acts--acts of individual human persons.[144]

Unitarians like Plato and Hobbes sought to merge civil society and political power because they thought the coercive potential of the latter necessary to organize the dissonance arising from individual interests in civil society. In liberal societies, the state must respect and avoid interference with the right of individuals to differ and disagree with one another, or to associate on the basis of differing interests. This mandatory non-interference by the state inures only until individual behaviour, plurality, or social association violates the rights of individuals. Civil society, although self-regulating, is not constituted by any coercive force or power and cannot successfully punish the violation of individual rights or protect

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Society in European Political Thought from the Twelfth Century to the Present (Ithaca: Cornell University Press, 1984) 65.

[144] Finnis, *supra* note 102 at 11 [emphasis in original] [footnotes omitted].

rights from violation. The state is the locus of power and coercion and liberals leave the function of protecting violation of individual rights to the state. Stated precisely, the liberal state is free to preserve, protect, and punish the violation of individual rights, but not to direct the organizational harmony of the social commonwealth. If the state were committed to the latter end, liberals argue, it would end up violating the rights which it is established to preserve. Therefore, the state

> is to leave people at liberty to associate and disassociate as they choose, to transact among themselves either on a pecuniary or cash-free basis, and to pursue whichever forms of civility they see fit to follow--just so long...as they refrain from violating rights in the process.[145]

In liberal theory, then, civil society is the container of individual rights and interests, and the state is the *protector* of individual rights and liberties. Liberals are "moral and political individualists"[146] and all institutional relationships in society are premised on the fundamental construct that "only individuals have moral rights and...justifiable legal and moral norms [including a minimal state

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[145] Lomasky, *supra* note 1 at 54.

[146] Palmer, *supra* note 143 at 62.

and voluntary civil society] should be traceable back to individual moral agents."[147] Another liberal conception of civil society is grounded in the foregoing logic, which precisely stated is that

> autonomous individuals form a multitude of associations and freely move from one group to another or from activist membership to peripheral passivity, and back again, as they choose....They are motivated by interest or conviction or by cultural or religious identity; they pursue wealth (in partnerships and companies), or power (in parties and movements), or salvation (in churches or gathered congregations); or they aim to advance some particular good (in interest groups or trade unions), or to deliver some general benefit (in philanthropies and foundations), or to ward off some general evil (in organizations for the prevention of this or that). Civil society makes room for all these aims and includes all the resulting associations, by virtue of their free and consensual character.[148]

By providing space for individuals freely and voluntarily to associate, civil society allows individuals to carry on basic day-to-day activities. These daily activities are motivated by private interests, leading to actions and pursuits which individuals hope will bring benefits in the form of material gain, happiness, social status,

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[147] *Ibid.* at 63.

[148] Michael Walzer, "Equality and Civil Society" in Chambers & Kymlicka, eds., *supra* note 1, 34 at 35.

and companionship. In this sense, it is also accurate to describe civil society as "associations of ordinary life, the local solidarities that shape human loyalties and the pursuit of happiness."[149] As Adam Seligman puts it, civil society is

> that realm where the concrete person--that particular individual, subject to his or her own wants, caprices, and physical necessities--seeks the attainment of these 'selfish' aims. It is that arena where the 'burgher' as private person seeks to fulfill his or her own interests. Civil society is thus that arena where--in Hegelian terms--free, self-determining individuality sets forth its claims for satisfaction of its wants and personal autonomy.[150]

The actual institutions of liberal civil society can often be identified by how well they accommodate this nexus between individual freedom, voluntary association, and ordinary life.[151] Richard Brooks offers the following list of these institutions.

> [C]ivic institutions, mesogovernments, and the market. The civic institutions of civil society include the following: (1) the family and other informal institutions; (2) voluntary associations; (3) established

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[149] Miller, *supra* note 100 at 372.

[150] Adam B. Seligman, *The Idea of Civil Society* (Princeton, N.J.: Princeton University Press, 1992) 5.

[151] This is not to suggest that an institution is not part of liberal civil society merely because it conducts its affairs without regard for the relations included in this nexus.

> institutions; (4) realms of private law; (5) communities, whether based upon place, memory or shared characteristics; (6) traditions, culture, language, and customs; (7) regimes; (8) professions; (9) movements; (10) mesogovernments; and (11) the market. More specifically, the term 'informal institutions' embraces such groups as families, neighbourhoods and friends. 'Voluntary associations' includes clubs and civic associations. 'Established institutions' refers to schools, hospitals and other stable quasi-private organizations. 'Realms of private law' refers to common law systems of 'private law' such as property, torts, and contract law. 'Communities' refers to local communities, such as towns and villages, or groups, such as racial or gender groups which individually identify, one with another. Traditions, customs, language, and culture are either self-explanatory or too difficult to explain. 'Regimes'...refer to common property natural resource regimes, like fishing cooperatives, but can be extended, for example, to a variety of common resource managements, as well as residential neighbourhood associations. 'Profession'...embrace[s] a wide range of occupations.... [M]esogovernments are localized forms of governance including state, regional, and local governments and the governance of semi-autonomous societies.[152]

It is relevant to observe that Brooks includes non-corporeal institutions (traditions, culture, language, and customs) within his

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[152] Richard Brooks, "Law and Civil Society in the United States, Canada, Quebec, and the First Nations" (1998) 15 Ariz. J. Int'l & Comp. L. 1 at 12-15 [footnotes omitted]. I do not agree with the inclusion of 'mesogovernments' because they are part of the state. Also, mesogovernments exercise governmental powers and operate under the same mandate as government.

classification of the institutions of liberal civil society. Traditions and customs develop from the practices of members of civil society. Civil society is therefore a building block of traditions, and maintaining traditions is instrumental to the growth of civil society.[153] In keeping with the liberal view of civil society, traditions and customs which develop out of civil society, such as marriage, must be kept separate from the coercive influence of the state. These traditions and customs grow and adapt to changing circumstances by means of the ordinary order of things, not by the conscious proclamation or organization of the state.

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[153] Hallowell suggests that this view of traditions and customs was not always prevalent in liberal theory. He notes that

> [i]t was one of the weaknesses of liberalism that it tended to...exalt abstract reason to the neglect of custom and tradition. Thus it tended to foster the dangerous illusion that we can construct a civil society *de novo* and *ex nihilo*....[W]e [cannot] proceed to construct a social order from a set of a priori assumptions....Sentiment, or love, therefore, must always be reckoned with, and it is only by inculcating habits of veneration through institutions that the passions of men can be channelized into socially beneficent action.

Supra note 74 at 85-86 [emphasis in original].

However,

> [a] new social philosophy will retain the liberal goal of freedom, but it will temper its passion for individual freedom with concern for the community welfare, and it will conceive of the community in more organic terms than the liberal was inclined to do.

Ibid. at 87.

2.4. The Purpose of Liberal Civil Society

Notwithstanding disagreements among the various traditions of political thought on the conceptual scope of civil society, historical and contemporary debates on civil society generally emphasize the ethical or 'civilizing' potential of civil society, by which its constituent associations (or in the case of universalists, the commonwealth) seek to organize human life around the pursuit of the common good or the good life. Views on how to achieve ethical association or civility usually enlist normative tasks or goals which arise from reflections on the concept of civil society. For example, classical theories were generally directed towards the institution of a politically directed community which "exists for the sake of the 'good life' and is the full and self-sufficient consummation of human moral development."[154] The essence of the *polis* lay in the pursuit of moral action through "political deliberation and public action,"[155] and in providing disinterested guarantees of freedom and equality prerequisite to moral life outside the "limited potential of subsidiary

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[154] Ehrenberg, *supra* note 48 at 10.

[155] *Ibid.*

levels of organization"[156] such as the family and villages. Medievalists saw the moral purpose of a political commonwealth as 'fleeting,' and maintained instead that permanent good through the avoidance of sin would save civil society from the "chaos unleashed by demonic power."[157] Hegel's justification for an independent civil society was also grounded in its contribution to the ethical development of the conscious man in a community of needs, although Hegel thought that civil society had limited ethical potential because it was unable to save humans from want and destitution which resulted from the freedom it afforded. Hegel's civil society is therefore "a moment in freedom...[albeit] a limited and dangerous moment because it drives towards making itself the only determination for human beings."[158] The ethical substance of civil society therefore informs its purpose and many views on civil society are more concerned with the "ideal type" of civil society than with civil society in the strict sense. However, it is also clear from the

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[156] *Ibid.*

[157] *Ibid.* at 35.

[158] *Ibid.* at 126.

examples given that in many societies the notion of ethical does depend upon historical, social, political, or religious prejudices.

For liberals, ethical association means forms of human association that promote human flourishing. Therefore "the test of civil society, and the state, is whether it helps people flourish."[159] Human flourishing in liberal terms, according to Miller, resides in "unfettered [individual] freedom and in relationships that have no presumptive reason to heed traditional patterns or state authority;"[160] "a minimal 'night watchman' state, responsible for protecting the plural pursuits of human well-being rather than for ensuring organic harmony;"[161] "relationships...growing out of private pursuits of economic and other interests;"[162] and "government [which] exists by virtue of the powers that have been delegated to it 'from below.'"[163] Miller is right in this, for the conditions of freedom and opportunity of those who live in liberal

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[159] Scalet & Schmidtz, *supra* note 95 at 26.

[160] Miller, *supra* note 100 at 374.

[161] *Ibid.*

[162] *Ibid.*

[163] *Ibid.* at 375.

states are dependent on the existence of these conditions. Also, the purpose of liberal civil society can be derived from this foundational structure. In my view, this would include two main propositions. First, civil society provides a space for individuals *voluntarily* to interact and to pursue their interests and convictions in any manner they see fit without recourse to rules of action that bind them to behave in ways they do not wish. The idea of civility is rooted in this logic of voluntary action and non-interference because "civility ...evolve[s] on the premise that individuals left to their own initiatives will forge cooperative relationships."[164] Goran Ahrne agrees that

> [t]he idea of civil society is an idea about improved qualities in interaction between people and in relation between individuals and society. It is a discussion about forms of interaction to allow people to be individuals at the same time as they are parts of a society. The creation of civil society presupposes and implies a precarious balance between individual participation and social obligations.[165]

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[164] *Ibid.* at 382.

[165] Goran Ahrne, "Civil Society and Uncivil Organizations" in Jeffrey C. Alexander, ed., *Real Civil Societies: Dilemmas of Institutionalization* (London: Sage Publications Ltd., 1998) 84 at 84.

The injunction of non-interference with individual pursuits applies to state and the associations of civil society equally, although it is more likely that the state, which is coercive by nature, would readily interfere with the individual rights consolidated in the associations of civil society. For example, the state exerts a large measure of control over many associations of civil society through the concept of legal personhood. Legal personhood is a form of legal citizenship and the implications that flow from it allow government to regulate directly and impose duties on these entities as it would its citizens. However, associations are not bound to pursue legal personhood and although it is almost impossible for large corporations to exist otherwise, it can be argued that members of such associations tolerate state regulation and control because of the pursuit of gain. The concept of legal personhood is however important to show that except where associations of civil society submit by choice to interference, they are otherwise not subject to government control. Also, associations of civil society may have rules that guide their practices and pursuits. The members are mandated to follow these rules only to the extent that they see it fit to do so. It is implicit in voluntary membership that the traditions of associations within civil

society must change by agreement of its members. The state cannot impose or support change without its agreement because this will interfere with rights composite in the association.

Second, civil society provides a forum for individuals to protect themselves from state power. In this regard, associations of civil society constitute collective power which can be galvanized against the state to protect civil society and the individuals who constitute it. Individuals are able to do this through civil society because state power is essentially delegated from the ordinary people of civil society to the ordinary people in government. According to John Keane, in his analysis of Thomas Paine's rights-based argument in the *Rights of Man*,

> states can be considered legitimate...only when they have been formed through the explicit consent of individuals and when this active consent is formulated constitutionally and articulated continuously through parliamentary, representative mechanisms. Civilized governments are constitutional governments empowered by the active consent of naturally free and

> equal individuals. These governments have no rights, but only duties before their citizens.[166]

Liberal democracies such as Canada are typically run by constitutional governments which are elected into and removed from power by the individual members of the state. The power to remove government enables the electorate to hold government to account and check its power. Because individual citizens cannot directly impact on government power in any significant way, civil society enables them to do so collectively. Ehrenberg notes that civil society's

> dense networks of associations increase citizen's political influence on the state, make them less vulnerable to mass demagoguery, and reduce the importance of politics by spreading interests over a wide public space. It is the 'prime means by which the function of mediating between the individual and the state is performed' and [it] help[s] [the individual]...avoid the dilemma of being either a parochial, cut off from political influence, or an isolated and powerless individual, manipulated and mobilized by the mass institutions of politics and government.[167]

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[166] John Keane, "Despotism and Democracy: The Origins and Development of the Distinction Between Civil Society and the State 1750-1850" in Keane ed., *supra* note 49, 35 at 47.

[167] Ehrenberg, *supra* note 48 at 205.

The liberal idea of civil society can be said to have developed for the purpose of providing a forum for citizens collectively to avoid the excesses of state power. As Keane puts it, the "transformation and subdivision of the idea of *societas civilis* [civil society] was stimulated primarily by a specifically *political* development: the fear of state despotism and the hope...of escaping its clutches."[168] While liberals do not consider the state unnecessary, they are however wary of its power and believe in the power of local associations and solidarities that would help institute good governments and remove arbitrary ones. Ernest Gellner captures the point of this purpose precisely when he defines civil society as

> that set of diverse non-governmental institutions which is strong enough to counterbalance the state and, while not preventing the state from fulfilling its role of keeper of the peace and arbitrator between major interests, can nevertheless prevent it from dominating and atomizing the rest of society.[169]

A related point is this: that the *ideal* civil society (and I use the word *ideal* in a normative, and not a limiting, sense) does not allow

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[168] Keane, *supra* note 166 at 65 [endnotes omitted].

[169] Ernest Gellner, *Conditions of Liberty: Civil Society and its Rivals* (London: Hamish Hamilton, 1994) at 5.

associational life or the existence of associations that exert forms of power inimical to the flourishing of its individual members. The rules of association must therefore abide by those conditions which I have so far shown to be entrenched in the nature and purpose of civil society, including maintaining and respecting the priority of persons and their pursuits, recognising the right of free entry and exit in the associations of civil society as a *fundamental* condition of such association, and allowing free moral equals to exist without any "presumptive reason to heed traditional patterns or state authority."[170] This point is valid in any normative discourse of civil society, especially with regard to strong social groups that wield considerable power over the lives and choices of its members. These groups are often prevalent in non-liberal states with powerful religious communities. In such religious communities, the leaders are often times occupied with advancing, strictly enforcing and sanctioning, on pain of punishment, doctrines which prescribe everything from behaviour to social roles, from the meaning of happiness to the ends of life. Gellner's description of the traditional agrarian world captures the spirit of such communities as follows:

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[170] Miller, *supra* note 100 at 374.

> These [communities]...maintain their cohesion, internal discipline and solidarity with the help of much ritual, employed to underscore and enforce social roles and obligations. The social roles are generally conceived and defined in kin terms, and may indeed frequently be filled in terms of the kin positions of their occupants. So political, economic, ritual and any other kinds of obligations are superimposed on each other in a single idiom. This strengthens all of them: one cannot ignore one's kin of obligation, for instance, without imperilling other relationships. The price of such strengthening is of course that all spheres of life become rigid, and innovation, technical or other, is rendered that much harder. The social visibility and authority of relationships is fortified by a plethora of ritual reminders...and hence additional possible transgressions, the avoidance of which puts a heavy and constant burden on each individual, and thus keeps him in awe of the social order as a whole. There are so many ways of putting a foot wrong that a man is always at risk and seldom socially innocent....His role is stable and ritually orchestrated. It is both internalized and externalized: it enters deep into his soul, and a plethora of markers pervades the outward life of the community. It endows him with an identity both secure and inescapable. He knows only too well who he is and what is expected of him: his prospects of redefining his own identity are negligible.[171]

Although Gellner is referring to the traditional agragrian or "segmentary community,"[172] his description holds true of life in states where political life is constrained and structured by

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[171] Gellner, *supra* note 169 at 6-7.

[172] *Ibid.* at 8.

comprehensive religious doctrines. In such states, associations of civil society blur the lines of separation from the state by maintaining and enforcing doctrines of social association, or sanctioning its contravention, usually by force of state power. Put otherwise, a powerful civil society *colonizes* the state and law. Gellner's notion of civil society--"a society liberal in the modern sense"[173]--excludes such doctrinal tyrannies as well as "segmentary communities, cousin-ridden and ritual-ridden, free perhaps of central tyranny, but not really free in a sense that would satisfy us."[174] The colonization of state by civil society cannot be justified within a liberal discourse of civil society. More significantly, as and I will argue so subsequently, given that the separation of state and civil society is implicit in the political morality of states, it is then the business of law and the state to directly negate such colonization.

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[173] *Ibid.* at 48.

[174] *Ibid.* at 12.

CHAPTER THREE

THE LOCATION OF CIVIL SOCIETY WITHIN LIBERAL POLITICAL MORALITY

3.1. Introduction

In the preceding chapter, I examined at some length the liberal view of civil society and its significance to our normative understanding of liberal states. The main thrust of the liberal view is that there is a structural separation of state and civil society--a separation which emphasizes voluntary association, the priority of morally equal persons, and those limitations, legal or otherwise, which protect life from state power, amongst other things. The liberal view of civil society is also concerned with the relationship between the state (or government) and the governed, and by analogy, the relationship between law and life, because law, from its genesis to application, "above all else involves the state."[175] In this chapter, I will further highlight the normative significance of the liberal view of civil

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[175] F.C. DeCoste, *On Coming to Law: An Introduction to Law in Liberal Societies* (Markham: Butterworths, 2001) 131.

society by locating civil society within liberal political morality. I have chosen the concept of political morality as a standard of measurement because, as we shall see, political morality "identif[ies] and expound[s] some value (or values) which, in its view, is the proper foundation for the terms and conditions of human association in political community."[176] These values are entrenched in political and legal philosophy and deal not just with the terms of political organization, but also with the relationship between institutions/organs of the state and the persons they govern. I shall begin the chapter by establishing the meaning of political morality and the reasons for its importance. I will then identify the principles of liberal political morality and by so doing, highlight those parallels which may be drawn with my earlier formulation of civil society.

3.2. Preliminary Issue-What Morality?

Before I proceed to examine the meaning of political morality, several quick and general comments about morality are in order. First, defining or explaining morality with any precision is

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[176] *Ibid.* at 132.

notoriously difficult. Therefore, no attempt will be made to pursue any such definition or explanation here. It will suffice for our purpose to state that individual, social, and political life must be grounded in some form of morality. Second, I simply posit moral rules as shared principles which serve the good of the community in general,[177] allow good to prevail over evil, protect human life, and preserve cultures that are "more sane, more apt to bring happiness, and more worthy of human dignity."[178] Third, by stating that moral principles are shared principles, I do not mean to suggest that these principles are fashioned by express and unanimous agreement of members of the state. Rather, they arise from a gradual and continuous refinement of precepts and actions, and become acceptable because they are, and will remain, beneficial to persons

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[177] This position echoes Hayek when he states: "There is as much need of moral rules in political as in individual action, and the consequences of successive collective decisions as well as those of individual decisions will be beneficial only if they are all in conformity with common principles." F.A Hayek, *The Constitution of Liberty* (Chicago: The University of Chicago Press, 1960) 67-68.

[178] Arthur Liebert, "Political Morality" trans. by S.C Steinbrenner (1938) 49 *Ethics* 62 at 62. Liebert is describing those cultures which persons look to the state to protect and preserve.

even in indeterminate or unpredictable circumstances.[179] Hayek offers individual freedom as an example of a moral principle of political action because "it demands that it be accepted as a value in itself, as a principle that must be respected without our asking whether the consequences in the particular instance will be beneficial."[180]

3.3. The Meaning of Political Morality

In order to arrive at a *justifiable* view of political morality,[181] I have chosen to analyse a number of definitions and understandings of the concept. I shall begin with a definition offered by Richard Vernon. According to Vernon, taken simply, political morality refers to

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[179] Hayek adds: "[M]oral rules for collective action are developed only with difficulty and very slowly. But this should be taken as an indication of their preciousness." *Supra* note 177 at 68.

[180] *Ibid.*

[181] By a justifiable view, I mean a normative view, one which, as Nagel argues, differs from a persuasive view because "arguments that justify may fail to persuade, if addressed to an unreasonable audience; and arguments that persuade may fail to justify." Thomas Nagel, "Moral Conflict and Political Legitimacy" (1987) 16 Philosophy and Public Affairs 215 at 218. Thus, "justifications hope to persuade the reasonable, so these attempts have a practical point." *Ibid.*

"conclusions of morality, *whatever they are*, in their application to politics."[182] This definition is not very helpful because it merely emphasizes what we already know, which is that the term political morality connects politics to morality. Also, it avoids any precise statement of the nature of such morality as is applicable to politics, and thus allows the meaning that *any* conclusion of morality which can be applied to political life is justifiable. Vernon's definition is too open-ended and leads us to think of political morality as dependent on personal or social views of morality. However, it is inconceivable that political morality can be grounded on personal or social morality. Political and personal morality relate to different matters: while personal morality "has as its object what it means [individually] to lead a good life,"[183] political morality "concerns itself, not with individual good...but with the good of the political community."[184] DeCoste states correctly that the minimal concerns of political morality are

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[182] Richard Vernon, *Political Morality: A Theory of Liberal Democracy* (London: Continuum, 2001) 35 [emphasis added].

[183] DeCoste, *supra* note 175.

[184] *Ibid.* at 131-132.

> to identify the institutions required for a community's political life...to structure the relations between those institutions...to set standards for the treatment of members of political community by those institutions and...to identify when those institutions may regulate the relations between members of political community and in what fashion.[185]

In order to meet these minimal concerns and for political morality to cater to the good of all within political community, justifiable political morality must be based on impartial standards of morality that are accepted by everyone, not on differing moral beliefs of persons.[186] Impartial political morality also avoids personal disagreements over what moral truths are applicable to political life,

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[185] *Ibid.* at 132.

[186] According to Nagel,

> [t]he clash between impartiality and the viewpoint of the individual is compounded when we move from personal ethics to political theory. The reason is that in politics, where we are all competing to get the coercive power of the state behind the institutions we favor-institutions under which all of us will have to live-it is not only our personal interests, attachments, and commitments that bring us into conflict, but our different moral conceptions. Political competitors differ as to both the form and content of the impartial component of morality. They differ over what is good and bad in human life, and what kind of equal respect or consideration we owe each other.

Supra note 181 at 215-16.

disagreements which may obscure "the values that public institutions should serve, impartially, for everyone."[187]

Moreover, personal morality has some consequences which cannot be favourably applied to political life. Personal standards of morality differ from one individual to another, leading individuals to proffer often-changing personal beliefs or what Bruce Ackerman refers to as the "fragmentary character of real-world dialogues...[we] conduct,"[188] as the perfect moral truth. In its application to political life, personal morality may also lead to the forceful substitution of "the authority of the impersonal [political] standpoint for a point of view that is in fact that of a particular individual or party."[189]

Political morality is also distinct from social morality. By social morality, one refers to the principles of action and thought which binds the various associations of social life. Social morality is defined by the commonalities of those who make up a particular social

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[187] *Ibid.* at 216.

[188] Bruce Ackerman, "Why Dialogue?" (1989) 86 The Journal of Philosophy 5 at 6.

[189] Nagel, *supra* note 181 at 230.

group. Social morality is shared morality because it is marked by the agreement of a group of people to maintain similar moral viewpoints. However, group morality is often limited to the interactions of each particular group, and social groups differ from one another on moral viewpoints. Political morality, unlike social morality, seeks to bind the political whole, including state institutions, persons, and their different social groups. Vernon elaborates on this distinction as follows:

> Political morality takes as its subject the relationships between citizens as mediated by public institutions and the publicly sanctioned use of power. These relationships, and the obligations connected with them, have to be justified by considerations which bear upon the political community as a whole....Social morality, however, takes as its subjects the relations of unmediated reciprocity among co-citizens, and it is their interests, considered severally, that count, rather than considerations about the political needs of the community as a whole. So the conclusion that we arrive at is not an arbitrary one, but makes sense in terms of elementary differences between political and social interactions.[190]

It follows, therefore, that normative political morality only mediates public life, and not social life.

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[190] Vernon, *supra* note 182 at 104.

Because political morality mediates public life, it cannot be based upon the moral views of particular social groups, except where such views achieve universal affirmation or recognition within the state.[191] Liberal political morality is founded upon such a shared recognition of basic public values by those who hold opposing life views. This position is derived from Rawls' idea of overlapping consensus. Precisely stated, the idea holds that the public political culture of a democratic society is dependent on a workable political conception, one which is just,[192] and "affirmed by the opposing

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[191] The standards of public life often arise from the moral beliefs of the dominant group within the state. This does not assure that the dominant moral beliefs without more can guarantee justifiable political morality, especially if these beliefs translate to actions detrimental to minority groups. Hayek sums up this point as follows:

> Just as a group may owe its rise to the morals which its members obey, and their values in consequence be ultimately imitated by the whole nation which the successful group has come to lead, so may a group or nation destroy itself by the moral beliefs to which it adheres. Only the eventual results can show whether the ideals which guide a group are beneficial or destructive. The fact that a society has come to regard the teaching of certain men as the embodiment of goodness is no proof that it might not be the society's undoing if their precepts were generally followed.

Hayek, *supra* note 177 at 67.

[192] By 'just', Rawls means that the political conception is a moral conception worked out for the basic structure of society, namely, society's main political, social, and economic institutions. However, Rawls does not explain the moral

religious, philosophical and moral doctrines likely to thrive over generations in a more or less just constitutional democracy."[193]

In explaining the idea of overlapping consensus, Rawls contends that in societies with a "background of enduring free institutions,"[194] there is marked allowance for a diversity of opposing comprehensive religious, philosophical, and moral doctrines, some of which are perfectly reasonable and some of which are not. The diversity of opposing comprehensive doctrines is a "permanent

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framework of this political conception with any exactitude. According to him, the content of a moral conception is "given by certain ideals, principles and standards; and that these norms articulate certain values, in this case political values." Rawls, *supra* note 96 at 11, n. 11. Thus, the contents of the political conception are moral by their own terms, and are taken to be 'just' as claimed.

[193] Rawls, *supra* note 45 at 1. Rawls further proposes that an overlapping consensus on a reasonable political conception of justice can also be the basis for securing stable social unity. By so stating, Rawls attempts to foist a moral conception, or a view of justice, on social institutions. Social unity and social stability may be desirable in any society, but it should be made clear that it is not necessary for the existence or functioning of institutions of civil society. Put simply, social institutions need not agree on social values. However, the accuracy of Rawls' view of social unity and the overlapping consensus is not in issue here and we need not consider it any further.

[194] Rawls, *supra* note 96 at 4. Rawls thinks "[t]he aims of political philosophy [to be] depend[ent] on the society it addresses." *Supra* note 45 at 1.

feature of the public culture of modern democracies"[195] and "not a mere historical condition that may soon pass away."[196] Also, comprehensive doctrines belong to the background culture of civil society and are strictly separated from the domain of the political. One of the significant benchmarks of Rawls' political theory is this insistence on the strict separation of the political from the non-political, or state from civil society. The non-political consists of the associational, personal, and familial; it is the culture of the social from which comprehensive doctrines of all kinds abound. Because the social is separate from the political, "questions about constitutional essentials and matters of basic justice [which characterize only the political] are so far as possible to be settled by appeal to political values alone."[197] In other words, "as a practical political matter, no general and comprehensive view can provide a publicly acceptable basis for a political conception of justice."[198] The only way political society could maintain a "public and workable

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[195] Rawls, *supra* note 45 at 4.

[196] *Ibid.*

[197] Rawls, *supra* note 96 at 137-138.

[198] Rawls, *supra* note 45 at 4 [footnotes omitted].

agreement on a single general comprehensive conception"[199] is "by the oppressive use of state power."[200] Rawls acknowledges that political values may originate "from within a general and comprehensive doctrine"[201] or from "fundamental intuitive ideas viewed as latent in the public political culture of a democratic society."[202] Nonetheless, in well-ordered democratic societies, there must be sufficient consensus by all citizens and groups on the fundamental political values which regulate and order the conflicts arising from plurality and diversity. Rawls contends, rightly, that given the fact of diversity and reasonable pluralism,[203] political

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[199] *Ibid.*

[200] *Ibid* [footnotes omitted].

[201] *Ibid.* at 8.

[202] *Ibid.* at 6. Fundamental intuitive ideas are the products of "a tradition of democratic thought, the content of which is at least intuitively familiar to citizens generally." *Ibid.* Societal institutions, their customs and "accepted forms of their interpretation" all contribute to this "fund of implicitly shared fundamental ideas and principles." *Ibid.*

[203] Note that Rawls distinguishes between reasonable pluralism and the mere fact of pluralism. According to him, what matters is not "simply the upshot of self- and class interests, or of peoples' understandable tendency to view the political world from a limited standpoint." *Supra* note 96 at 37. Rather, political conceptions rely on the diversity of reasonable views arising from the multitude of voices, specifically, "the work of free practical reason within the framework of free institutions." *Ibid.* Therefore, "[i]n framing...[a] political conception so that it

values must either adopt these fundamental intuitive ideas or hope to gain the support of an overlapping consensus, that is, a consensus affirmed by the many comprehensive doctrines thriving in civil society.[204] If the "fact of oppression" is to be avoided, political institutions are required to abide by, and operate within rules which respect these "shared methods and...common knowledge that allows us to speak of *public* reason."[205] Therefore,

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can...gain the support of reasonable comprehensive doctrines, we are not so much adjusting that conception to brute forces of the world but to the inevitable outcome of free human reason." *Ibid.*

[204] Rawls offers freedom and equality as examples of fundamental intuitive ideas which are accepted by a wide range of citizens in democratic societies. In these societies, people are said to be free and equal not because of any "religious, philosophical or metaphysical ideas", but because these principles reflect widely accepted values that attach to the "basic rights and liberties of democratic citizens." *Supra* note 45 at 7 [footnotes omitted]. Elsewhere, he suggests that opposing comprehensive views could arrive at some consensus on a doctrine of free religious faith, one which could justify and support religious diversity, but negate the constraint of each individual's liberty to profess a particular religious faith. See *ibid.* at 14-15. This view of liberty rightly subordinates the right to religious faith to individual rights. The British Columbia Supreme Court came to this conclusion in *Thomas v. Norris*, [1992] 2 C.N.L.R. 139 where it held that even where an aboriginal right to traditional practices exists, it is subordinate to the plaintiff's common law rights in tort for acts committed against the plaintiff by the defendants in the performance of certain traditional rites.

[205] Rawls, *ibid.* at 8 [emphasis in original].

> our [liberal] exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.[206]

Our primary view of political morality thus distinguishes that concept from personal or social morality. Whatever principles of morality are applicable to political life must maintain an "epistemological division between the private and the public domains."[207] Also, since political morality structures the relations between political institutions and the governed, its aim is to set standards and precepts supported by all citizens, no matter their separate conceptions of the good.

There is another view of political morality which is prevalent in contemporary American jurisprudence according to which political morality is measured in terms of personal perspectives on the morality of all things political, including, in most cases, *the moral duty to obey the law*. This view, much like Vernon's definition, also

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[206] Rawls, *supra* note 96 at 137.

[207] Nagel, *supra* note 181 at 230.

proceeds from the erroneous premise that political morality is subordinate to notions of personal morality and is therefore not acceptable for our purposes here. In addition, by equating obedience to political office with obedience to law, those who hold this view of political morality confuse the clear distinction between politics and law. This confusion arises from the supposition that law is the will of those who hold political office, particularly when such laws are reflective of the moral position of the lawmaker. Consequently, where laws (seen as the moral will of the lawmaker) do not conform to one's notion of personal morality, one does not have a moral duty to obey the law.[208] However, it is not every whim of the lawmaker that qualifies as law, unless we accept (and I do not) the positivist notion that political regulation, no matter its moral value, is law.[209] Rather, the law, in my view, refers to norms of higher validity than mere positive regulation (and by this I do not intend to say that no positive regulation qualifies as law), to a corpus of standards

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[208] Thus, it is common to find essays on the political morality of race legislation, women's rights, gay rights, etc.

[209] As Hayek puts it, "if a law gave the government unlimited power to act as it pleased, all its actions would be legal, but it would certainly not be under the rule of law." Hayek, *supra* note 177 at 205.

fashioned in the spirit of morality described earlier. Law, properly speaking, derives its validity from its conformity with normative ideals of general acceptance, not from the usually contingent formal endorsement of the lawmaker. Because the ideals to which the law must conform are generally accepted, law, properly conceived, is anterior to the state and regulates the actions of lawmaker, other institutions of the state and the individual members of the state. Such law is the bedrock of political morality because it promotes high ideals by which the propriety of positive regulation and politics, and the realization of those minimal concerns of political morality are measured. The ideals which support the existence of law in practice are familiar to liberals as the ideal of the *rule of law*. We shall encounter more characteristics of such law or rule of law shortly in my discussion of liberal political morality.

With regard to the view of political morality under consideration, it is therefore correct to say that what perplexes the individual who holds this view is not the moral duty to obey the law, but rather the duty to obey political power that is exercised contrary to the rule of law, or positive law which does not embody the spirit of this manner

of law properly so called. In states where the rule of law is respected, the individual can successfully challenge political power or law contrary to the rule of law by judicial action. Hence, another view of justifiable political morality is dependent on the existence of law, one which commands in accordance with the rule of law.

The final view that I will consider holds that political morality is "special to the political domain (or else minus any items that do not belong there)."[210] This is true because the primary purpose of political morality is to structure and direct the action of political institutions particularly with regard to how these institutions relate to the members of the state. However, in analysing this view, one should be careful not to mistake purpose for origin. Political morality may serve a special purpose within the political domain, but it is not a creation of politics. It is very doubtful that justifiable political morality can be designed by those whose actions it is intended to regulate. Even where the best men govern, there is a danger in allowing state institutions to formulate the fundamental principles by which political life is sanctified. Arthur Liebert argues

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[210] Vernon, *supra* note 182 at 35.

that this is because the state is naturally and traditionally associated with power and coercion,[211] and the "principal tools of the state for its striving for power are politics."[212] The state's power arises as a consequence of the inevitability of social and cultural conflict, conflicts which cannot be reconciled by the "sensitiveness of judgment and...moral considerations"[213] of a diverse human population. Liebert contends that the power of the state may be "very often for political and economic reasons comprehensible and justifiable,"[214] but it is doubtful that the state "possess[es] any claim to moral right or does it present a moral necessity."[215] To say that morality is inherent in the state is to subordinate moral law to politics, a condition which cannot be because

> [t]o establish politics as arbitrator over morality, and on the whole over life itself, means nothing less than to deliver life to force and to the sword, to might and to

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[211] "The main characteristic of the state is always power, and to this it is entitled...this is a quite natural right--namely, that kind of a right which is inherent in its very existence, and which increases in the measure that the existence with which it is linked may increase and grow stronger." Liebert, *supra* note 178 at 63.

[212] *Ibid.*

[213] *Ibid.*

[214] *Ibid.*

[215] *Ibid.*

> astuteness, to the hidden paths of imposition, and to human passions that may change from hour to hour.[216]

States often direct their powers to matters which violate the moral well-being of their citizens and those material freedoms which shape the individual's "right and power of self-determination"[217] or the "human qualities of moral living."[218] Thus, "a morality that finds its sources exclusively in political considerations and deferences is lacking the chief reason for a free and independent decision."[219] The omnipotence of the state and its expression of power is, in Liebert's view, mostly antithetical to the spirit of morality.

Liebert's pessimism about the use of power by the state is, in my view, most appropriate to *irresponsible* states (whether constituted by dictatorial authority or not) where those who govern are led by wholly political sentiments which coercively advance the power of the state rather than defend those moral sentiments which are at the root of an effective use of power. Political institutions, in order to

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[216] *Ibid.* at 66-67.

[217] *Ibid.* at 64.

[218] *Ibid.*

[219] *Ibid.*

attain to a justifiable level of morality, "must be subordinated to the moral law--an unconditional demand from which no moral being can make any subtraction."[220] Put otherwise, the moral character of a state is not a creation of the individuals who operate the machinery of government, but exists only to the degree that these operators inure to the spirit of morality. As Liebert aptly puts it "[a] relationship or an association will only rise in the same measure to the level of morality, and will fulfil to that degree an ethical purpose, as its bearers and representatives endue their mutual relations with the spirit of morality."[221]

A related point that arises from the present analysis is that political morality depends on the effective use of power by state actors.[222] In other words, politics lacks morality where the power of the state is used in an abusive or coercive manner, namely, in ways which do

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[220] *Ibid.* at 66.

[221] *Ibid.* at 64.

[222] Vernon agrees that a stronger sense of the term political morality "refer[s] to a set of distinct political principles, applying specifically to the use of power, alongside the principles that we want to bring to bear on personal decisions." Vernon, *supra* note 182 at 35.

not conform to the spirit of morality, or to those principles of the liberal state embodied in the rule of law. By curtailing the abuse of power, a justifiable political morality ensures that the material attributes of moral living, including individual and social liberty and human well-being, are achieved. The standards of such political morality are high: only few states in empirical politics achieve it or abide by it for all time. However, political morality is a concept of normative rather than empirical significance. It is dangerous to subordinate principles of ethical living to the will of the state, more so the inglorious manifestations of autocratic states. In order effectively to use power, heed must be paid not to the empirical designs of those who govern, but to the normative constitution of the spirit of morality.

3.4. Liberal Political Morality: The Rule of Law

The meaning and place of the rule of law in political and legal theory has engendered much debate. This notwithstanding, liberals traditionally insist that the concept, in its application to the liberal state, is aimed at achieving and defending conditions of moral

equality. Thus, the rule of law in the liberal state has been described as the "stable, durable core of the political morality of political communities devoted to moral equality"[223] among "persons worthy of equal concern and respect."[224]

The origin of the liberal understanding of the rule of law can be traced back to the empiricist tradition in England. This tradition, which borrows from medieval and classical conceptions of the relationship between government and the governed, was based on the "comprehension, first achieved by the lawyers, of how institutions had developed."[225] Dating back to the medieval period, the English established notoriety as a tradition-loving people. The growth of long-standing English institutions such as the Crown and Parliament was accompanied by traditional safeguards designed to constrain the use of power by these institutions. One such notable safeguard which remains today is the dispersal of power among institutions that have reciprocal authority to check each other. Aside

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[223] DeCoste, *supra* note 175 at 160.

[224] *Ibid.*

[225] Hayek, *supra* note 177 at 58.

from these institutional safeguards, Hayek points out that the English were influenced by the classical concept of "Isonomia" or "equality of laws to all manner of persons," from which they designed concepts such as "equality before the law," "government of law," and eventually the "rule of law".[226]

Among the English, the rule of law prevailed in the *practice* of English political institutions. A popular statement of these practices is offered by Dicey in his epochal thesis on the rule of law.[227] According to him, the rule of law embodies "three distinct though kindred conceptions"[228] as follows:

a. "that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land"[229];

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[226] See *ibid.* at 164

[227] See A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan & Co. Ltd., 1964).

[228] *Ibid.* at 188.

[229] *Ibid.*

b. that "no man is above the law...every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals"[230]; and

c. "that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution...are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts..."[231], "thus the constitution is the result of the ordinary law of the land."[232]

Although Dicey's formulation has been severely criticised--mostly on the ground that his view of the rule of law is parochial in its anglicised treatment of a universally applicable subject[233]--his thesis highlights some empirical baselines to which legal, political and civic

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[230] *Ibid.* at 193.

[231] Ibid. at 195.

[232] Ibid. at 203.

[233] For criticisms of Dicey, see generally Judith Shklar, "Political Theory and the Rule of Law" in Allan C. Hutchinson and Patrick Monahan eds., *The Rule of Law: Ideal or Ideology*, (Toronto: Carswell, 1987) 1 at 5-6. See also Sir Ivor Jennings, *The Law and the Constitution*, 5th Ed. (London: University of London Press, 1959).

institutions must adhere in order to be in conformity with the rule of law.[234] These formulations may not provide the complete picture of what the rule of law demands in practice; however, they are instantiations of normative virtues ensconced in the rule of law, virtues such as the liberty and equality of all before the law. Also, the third component of Dicey's rule of law rightly identifies the role played by courts in shaping a valid constitutional regime, by which I mean a constitution based on the rule of law. The judicial process acts as a filter of the constitution, thereby separating rules 'pervaded' by the general principles of the rule of law from those which are not and as such, do not qualify to be recognised as part of the constitution. Dicey's faith in the judicial system is of course influenced by an amiable English tradition of justice and may not apply universally, but at least within liberal states, it is right to

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[234] It has been said that Dicey's primary intention in *The Law and the Constitution* was to draw attention to practical rudiments of the rule of law. See e.g. *Stephen's Commentaries on the Laws of England*, 21st ed., vol. 3 (London: Butterworth & Co. Ltd., 1950) at 337:

> Now the great constitutional lawyer Dicey, writing in 1885, was so deeply impressed by the absence of arbitrary government in England, in contrast to several other governments present and past, that he coined the phrase 'the rule of law' to express the regime under which Englishmen lived.

conclude that there is ample reliance on the judicial system as a means of checking abuses to the rule of law.[235] Although Dicey focused mostly on presenting the rule of law as a purpose-fulfilling principle attainable in the practice of English political institutions, he also identified its normative substance. In his view, the rule of law is coterminous with the "predominance of the legal spirit"[236] By so stating, he reminds us that the rule of law primarily and *ideally* demands a pervading sense of responsibility to law. To demand and command our sense of responsibility in that manner, law must in turn *be* responsible, failing which, it will reflect negatively on its custodians (the state) and the denizens whose lives it governs, and cause them to act irresponsibly.

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[235] This watchdog role of the courts is recognized in Canada's liberal democratic state. In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62, the Supreme Court noted with approval that

> Canada has evolved into a country that is noted and admired for its adherence to the rule of law as a major feature of its democracy. But the rule of law can be shallow without proper mechanisms for its enforcement. In this respect, courts play an essential role since they are the central institutions to deal with legal disputes through the rendering of judgments and decisions.

Per Iacobucci and Arbour JJ at para 31.

[236] Dicey, *supra* note 229 at 195.

In addition to serving moral equality and being a normative concept attainable in the practice of liberal institutions, there are other reasons why the rule of law is favoured as liberal political morality. Of these reasons, three are most compelling because they fit squarely within the principles of political morality identified earlier in this chapter. First, in societies where the rule of law thrives, individuals are allowed to express personal beliefs and conduct private dialogues freely without undue interference from others or government. Precisely put, "[t]he rule of law preserves for citizens an area of liberty in which they can live their lives free from the raw and direct application of power. It creates a framework within which the creative aspects of human life can thrive."[237] Liberals acquiesce in the liberty that individuals have to conduct their personal or associational affairs by severely limiting the actions of a powerful state within the private realm or the realm of civil society. The scope of this limitation is wide and necessary because the state's 'natural' power and overwhelming machinery could be easily adapted to social engineering. Therefore, liberals insist that

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[237] Dyson Heydon, "Judicial Activism and the Death of the Rule of Law" (2003) 47:1 Quadrant 9 at 10.

> though government has to administer means which have been put at its disposal (including the services of all those whom it has hired to carry out its instructions), this does not mean that it should similarly administer the efforts of private citizens. What distinguishes a free from an unfree society is that in the former each individual has a recognized private sphere clearly distinct from the public sphere, and the private individual cannot be ordered about but is expected to obey only the rules which are equally applicable to all. It used to be the boast of free men that, so long as they kept within the bounds of the known law, there was no need to ask anybody's permission or to obey anybody's orders.[238]

Often times, the exercise of personal freedoms can lead individuals to come into conflict with one another or with social and political institutions. Liberals see the rule of law as an impartial normative standard for the reconciliation of conflicts between individuals and between individuals and the state. Heydon puts this precisely as follows:

> The rule of law operates...by introducing a third factor to temper the exposure of particular citizens to the unrestrained sense of self-interest or partisan duty of other citizens or institutions--an independent arbiter not affected by self-interest or partisan duty, applying a set of principles, rules and procedures having objective existence and operating in paramountcy to any other organ of state and to any other source of power, and possessing a measure of independence

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[238] Hayek, *supra* note 177 at 207-208.

> from the wrath of disgruntled governments or other groups.[239]

Ackerman reaches the same conclusion in his analysis of the nature of private and political dialogue within the liberal state.

> When you and I learn that we disagree about one or another dimension of the moral truth, we should not search for some common value that will trump this disagreement; nor should we try to translate it into some putatively neutral framework; nor should we seek to transcend it by talking about how some unearthly creature might resolve it. We should simply *say nothing at all* about this disagreement and put the moral ideals that divide us off the conversational agenda of the liberal state. In restraining ourselves in this way, we need not lose the chance to talk to one another about our deepest moral disagreements in countless other, more private, contexts. We simply recognize that, while these ongoing debates continue, we will gain nothing of value by falsely asserting that the political community is of one mind on deeply contested matters. Doubtless the exercise of conversational restraint will...prevent each of us from justifying our political actions by appealing to many of the things we hold to be among the deepest and most revealing truths known to humanity. Nonetheless, our mutual act of conversational restraint allows us all to win a priceless advantage: none of us will be obliged to say something in liberal conversation that seems *affirmatively false*. Having constrained the conversation in this way, we may instead use dialogue for pragmatically productive purposes: to identify

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[239] Heydon, *supra* note 237.

> normative premises all political participants find reasonable (or, at least, not unreasonable).[240]

Although he does not mention the rule of law specifically, there is no doubt in my mind that the rule of law is that normative premise all members of the liberal state find reasonable. Because the rule of law provides for the reconciliation of all conflicts within the state, including conflicts between government and the governed, it is, in the first instance, anterior to the state.[241] In this way, the rule of law protects persons who come in conflict with the state from "untrammelled discretionary power."[242] Liberals measure the appropriateness of political institutions by how well they promote the good of the governed; arbitrary forms of government and an overarching state with intrusive powers are not attractive in liberal politics. Indeed, arbitrary power is the antithesis of a rule of law because it is always directed towards the good of political communities or political power. Liberals therefore invoke the rule of law as a safeguard against arbitrary power.

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[240] Ackerman, *supra* note 188 at 16-17 [emphasis in original].

[241] For a comprehensive case law analysis of the primacy of law as political morality, see DeCoste, *supra* note 175 at 132-135.

[242] Heydon, *supra* note 237.

Conflicts can be further avoided and effectively resolved where individuals and civil society uphold the rule of law. Tom Palmer suggests that one reason for the extra-political reach of the rule of law could be that individual rights assured by the rule of law became crystallized within a social rather than a political context. In Palmer's view, legal equality prospered in civil society, from social contracts between freely associating individuals and their elected representatives. He notes that "[a] central part of the growth of equal legal rights was toleration of nonviolent beliefs and behaviors"[243] in the social association of individuals. Civil society, like the state, "rests on a foundation of fundamental equality and liberty."[244] By commanding individuals and civil society to seek the reconciliation of conflicts by appeal to an impartial legal standard, the rule of law crystallizes age-long societal values. Through conflict resolution, the rule of law ensures that individuals accord each other equal care and concern. Precisely put, the rule of law is directed towards the resolution of conflicts in the human condition, for the sake of maintaining a condition of moral equality among persons.

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[243] Palmer, *supra* note 143 at 53.

[244] *Ibid.* at 54.

Second, liberals see the rule of law as a "meta-legal doctrine or...political ideal"[245] which is not concerned with the mere letter of the law[246] but with what the law ought to be or "the general attributes that particular laws should possess."[247] It is not a creature of political office. These general attributes are often the products of the shared traditions and ideals held by the members of a state. Conceived in this fashion, the rule of law imposes upon individuals (singly or in communion with others) the moral duty to obey laws that conform to those general attributes which it specifies.

Third, certain requirements inherent in the rule of law preserve the liberal preference for a distinct civil society. These requirements include respect for the primacy of individual rights, and the separation of powers. I shall now briefly discuss how these two requirements aid the liberal state in keeping the state separate from civil society.

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[245] Hayek, *supra* note 177 at 206.

[246] "The rule of law...is...more than constitutionalism: it requires that all laws conform to certain principles." Hayek, *ibid.* at 205.

[247] *Ibid.*

a. *Primacy of Individual Rights*

One reason why the rule of law has triumphed in liberal states is the remarkable insistence on the continued recognition of a regime of individual rights. Protection of individual rights is at the core of liberal theory and of the rule of law. Rights are bestowed on individual human beings because they are "the fundamental bearers of moral [and legal] status."[248] As noted previously, the genesis of a liberal theory of rights began with Locke's theory of natural rights. According to Locke, natural rights to liberty and equality are part of man's natural condition in the state of nature. These rights existed prior to the state and were protected by natural law. Because these rights are bestowed upon rational human beings by natural law, they are considered fundamental to human existence and happiness. Individual rights-bearers are therefore to be accorded the greatest level of respect.

Liberty and equality are hard concepts to define even among liberals who often disagree on the exact scope of each. However, the need for

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[248] Lomasky, *supra* note 1 at 52.

exact definition is outside the perimeter of this work and will not occupy us further. Taken generally, liberals see liberty as freedom from coercion[249] or the freedom to live, make choices, or govern one's self, and equality as the existence of common conditions for differing individual pursuits or the subjection of all to the same conditions of obedience to the law. More importantly, liberals agree that these rights, as they apply to each individual, are negative rights which must be protected from interference by others. As Lomasky puts it,

> [r]espect for persons' natural rights...is the primary instrumentality through which...[the well-being of mankind] is achieved. These basic rights are understood by...the...liberal tradition as negative: that is, as rights not to suffer interference in one's peaceful pursuits rather than as entitlements to assistance. Whatever one's ends or attachments may be, one must not pursue them in a manner that transgresses the rights of others. What one owes everyone in virtue of their status as rights holders is noninterference. Crucially, that is *all* that is owed.[250]

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[249] An exhaustive analysis of this view of liberty is covered in Hayek, *supra* note 177 at 11-21.

[250] *Supra* note 1 at 52 [emphasis in original] [endnotes omitted].

The norm of non-interference applies to all individuals and is protected by the state. Rights are therefore situated in a transcendent universal norm of association by which

> [o]ne is obliged to respect the rights of everyone, no matter how little regard in which one holds them and the ends that move them. Because the demands consequent on rights are both universal and mandatory, it follows that a rationally sustainable order of rights will be sharply restricted in the scope of its demands so as to be minimally intrusive on individuals' prerogatives in deciding how they will construct their lives. A general requirement of noninterference, as opposed to precepts of beneficence and mutual support, is the least implicative standard of social coexistence.[251]

Because the duties implied by the liberal construction of rights extend only to non-interference, government cannot require an individual to act in a particular way except with his consent or where necessary to prevent him from doing harm to others. Rights therefore establish for individuals

> zones of limited sovereignty within which they enjoy an immunity from demands on their moral attention and thus are free to direct themselves by their *own* moral lights rather than hitch their wagon to whatever happens to be in fashion or subscribed to by majorities.[252]

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[251] *Ibid.* at 53.

[252] *Ibid.* at 56 [emphasis in original].

Social groups and associations of civil society are similarly expected to abide by individual rights, and not to violate them. It is thus true that the liberal regime of rights "engender[s] maximally weighty claims with which transactors [individual, state, and civil society] *must* comply."[253] Individuals are free to make choices about the ways to exercise their basic rights. They also have "a robust right to do what is wrong."[254] Liberals frown at political action which manipulates the private wills of freely associating individuals towards the "realization of...alluring social ends."[255] This is because helping people make choices in their individual lives or affecting these choices within the assemblies of life to which they belong might and does in fact violate their liberties. In the final analysis, rights, conceived in the liberal fashion, "impede paternalistic interventions designed to prevent individuals from doing harm to themselves."[256]

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[253] *Ibid* at 55 [emphasis in original].

[254] *Ibid.* at 56.

[255] *Ibid.* at 55.

[256] *Ibid.* [endnotes omitted].

b. *Separation of Powers*

The readily known meaning of the doctrine of separation of powers (or what M.J.C. Vile describes as the 'pure doctrine' of the separation of powers[257]) is based on the understanding that

> [i]t is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct....In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.[258]

Conceived thus, separation of powers is an institutional means of checking the abuse of government power by ensuring that no branch of the state is ever powerful enough to rob men of their liberty and leave them with nothing. Proper checks on power require the

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[257] M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967) at 13.

[258] *Ibid.*

decentralization of government and the placing of limits on the exercise of each division such that "power...check[s] power by the arrangement of things."[259]

However, separation of powers is not just about designing effective political systems. As I will show by relying on Montesquieu's epochal contribution to the doctrine, separation of powers is ideally a commitment to the "spirit of laws" and is concerned, in addition to its 'pure' formulation, with setting the proper limits of governmental power within a larger legal and political context. Montesquieu knew that governmental power, among other things, was part of the structure of law. Laws, in turn, "taken in the broadest meaning, are the necessary relations deriving from the nature of things."[260] In order to "effectuate the wise exercise of governmental power,"[261] Montesquieu undertook an analysis of law and its implications for the exercise of governmental power. Because law is anterior and

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[259] Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone, eds., *Montesquieu: The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989) at 155.

[260] *Ibid.* at 3.

[261] Matthew P. Bergman, "Montesquieu's Theory of Government and the Framing of the American Constitution" (1990) 18 Pepp. L. Rev. 1 at 7.

superior to governmental power, the latter must conform, as every other relation, to the nature of things. Montesquieu began his analysis of the structure of law by classifying "the entire array of social norms to reveal the legal structure of a given society."[262] Social norms were an important inclusion because social relationships exist beyond written law and include "social, political, economic, cultural and geographical exigencies that determine the spirit of nations."[263] Social norms were part of the 'spirit' of law. Expressed in Montesquieu's exact words,

> [l]aw in general is human reason insofar as it governs all the peoples of the earth; and the political and civil laws of each nation should be only the particular cases to which human reason is applied....Laws must relate to the nature and the principle of the government that is established or that one wants to establish, whether those laws form it as do political laws, or maintain it, as do civil laws. They should be related to...the way of life of the peoples, be they plowmen, hunters, or herdsmen; they should relate to the degree of liberty that the constitution can sustain, to the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores and their manners; finally, the laws are related to one another, to their origin, to the purpose of the legislator, and to the order of things on which they are established. They must be considered from all these points of view....

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[262] *Ibid.*

[263] *Ibid.* at 8.

> [T]hese relations...form what is called THE SPIRIT OF THE LAWS.[264]

Since social relationships were part of the spirit of laws, Montesquieu sought to establish that it is "[o]nly by appreciating these [social] relationships can governmental power be wisely exercised; only by appreciating the 'spirit' of laws can their letter be enforced."[265] The institutional commitments of the branches of government must therefore be decided not just with regard to the relative functions and powers of each branch, but also in relation to other relationships within the larger structure of law. Power does not originate from government but beyond it, from the law. It is the law that separates power between the branches of government and by the same calculation, separates the power of government from other institutions which are part of the spirit of laws.

It can also be argued that governmental power must be kept separate from the functioning of social institutions because government, at

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[264] Cohler, *supra* note 259 at 8-9 [emphasis in original] [footnotes omitted].

[265] Bergman, *supra* note 261 at 8 [footnotes omitted].

least in democratic states, is concerned with administering the law, not with manners and customs. Montesquieu explains that

> [m]ores and manners are usages that laws have not established, or that they have not been able, or have not wanted, to establish. The difference between laws and mores is that, while laws regulate the actions of the citizen, mores regulate the actions of the man. The difference between mores and manners is that the first are more concerned with internal, and the latter external, conduct.[266]

Elsewhere, he states that "[t]he customs...of a free people are a part of their liberty."[267] The implication to be drawn from this is that customs relate to human action in a social context, outside the purview of government, and are separate from the law, which it is the business of government to administer. No good government can rightly or legally administer law and customs. "Only singular [despotic] institutions thus confuse laws, mores, and manners, things that are naturally separate."[268]

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[266] Cohler, *supra* note 259 at 317. The phrase "manners and customs" is used instead of "mores and manners" by early translators of Montesquieu. See e.g. Montesquieu, M. de Secondat, Baron de, *The Spirit of Laws*, trans. & 3rd ed. by Mr. Nugent (London: J. Nourse & P. Vaillant, 1758) vol. 1 at 428.

[267] Cohler, *supra* note 259 at 325.

[268] *Ibid.* at 321.

Manners and customs are part of what Hayek refers to as "freely grown institutions"[269] which are vehicles for the expression of individual freedoms. Manners, customs and traditions which promote the "beneficial functioning of a free society"[270] crystallize those values which free people have come to share and apply to themselves prior to or independent from political constitution or legal regulation. For the sake of liberty, the state ought not to interfere with these social customs, habits and traditions, unless they are unconscionable. Hayek rightly states that

> [t]here probably never has existed a genuine belief in freedom, and there has certainly been no successful attempt to operate a free society, without a genuine reverence for grown institutions, for customs and habits and '...those securities of liberty[,] which arise from regulation[s] of long prescription and ancient ...[usage].' Paradoxical as it may appear, it is probably true that a successful free society will always in a large measure be a tradition-bound society.[271]

Properly conceived therefore, the relations suggested by the separation of powers prevent the branches of government from

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[269] Hayek, *supra* note 177 at 61.

[270] *Ibid.*

[271] *Ibid.* [citing W.E Gladstone, ed., *The Works of Joseph Butler, D.C.L.* (Oxford: Clarendon Press, 1896) vol. 2 at 329].

encroaching upon matters outside the scope of government but which share in the spirit of laws. Montesquieu puts this well when he states:

> We have said that the laws were the particular and precise institutions of the legislator and the mores and manners, the institutions of the nation in general. From this it follows that when one wants to change the mores and manners, one must not change them by the laws, as this would appear to be too tyrannical; it would be better to change them by other mores and other manners. Thus, when a prince wants to make great changes in his nation, he must reform by laws what is established by laws and change by manners what is established by manners, and it is a very bad policy to change by laws what should be changed by manners.[272]

The point of the latter statement is clear and does not need any further elaboration. According to Bergman, "[b]y subordinating government to the general spirit of nations, Montesquieu posited a limiting force--like gravity--upon the acts of government officials."[273] To acknowledge that manners of society are a sub-structure of the spirit of the nation which cannot be altered by law or by government

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[272] Cohler, *supra* note 259 at 315.

[273] Bergman, *supra* note 261 at 10.

is "particular governing sentiment from which no political structure can long deviate."[274]

The doctrine of separation of powers, conceived in the manner explained here, coincides with the political morality of the liberal state. To accord individuals equal care and concern is to ensure that manners, those matters which regulate the actions of persons, and customs, which consists of social traditions their liberties, are not interfered with or varied by governmental power.

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[274] *Ibid.*

CONCLUSION

Throughout this essay I have explored certain significant normative understandings of the relationship between the liberal state and civil society in liberal legal and political theory. My focus in so doing was to counter some recent trends concerning the relationship between law and life in Canada which I identified briefly at the commencement of this essay. To remind us again, these trends concern the recent appropriation of the law by the Canadian state (particularly the judicial branch) for the purpose of changing traditions and practices of social life or as I have consistently referred to it, civil society, and the intrusive engagement of the state in reconstructing the lives of their individual members by regulating against their rights to live life in any manner they see fit. I argued against these trends by relying on normative constructions of the concept of civil society and liberal political morality. As regards the former, I established that civil society is an autonomous self-regulating enclosure of social life which affords rights-bearing individuals the freedom voluntarily to engage in assemblies of common interest with others. I also established that by its nature and

constitution, civil society and social life are prior to politics and the state. The state must resist the temptation to use its powers to organize civil society, and the only legitimate use of power in civil society is preventing legal harm to individuals. The rule of law also received some important attention in this essay because it represents the core of liberal political morality. Its fundamental commandments in the sense I understand and explain it are that social and political actors respect the rights of individuals within the state, and that power be kept separate from the institutions of social life.

In conclusion, I am of the view that the relationship that properly obtains between the state, civil society and individual under liberal legal and political theory resides in the following propositions: that there is a fundamental distinction between the state and civil society which must be preserved at all times by the liberal state; that civil society is an independent self-regulating sphere of life populated by free rights-bearing individuals or, simply put, an arena of social interaction; that social life as it exists in civil society is prior to politics and the state and that the conditions of the exercise of governmental power under law must, in liberal states, reflect this

priority; that in any case, individual rights, taken seriously as liberals do, is anterior and superior to the state and civil society or social life; and finally, that the liberal state would lose its credibility if, on the one hand, government actors were to use the law to manipulate social life or alter its institutions by encroaching upon the traditions which define its autonomy from the state and, on the other hand, were the state to continue to interfere with the positive freedoms of individual members by designing lifestyles for them.

Furthermore, the concepts I have examined in this essay direct the liberal state and its governors to certain actions with regard to civil society. First, the state must continue to recognize, affirm, and defer to the traditions, cultures, practices and institutions which constitute liberal civil society. In furtherance of this, the state must also situate its powers to make, execute and interpret law within the framework of affairs consequent upon such recognition of, and deference to civil society. By so doing, the liberal state confirms its understanding of its powers and limitations, and is better able to preserve and protect the rights of those who populate civil society. Also, the liberal state is not a state that exists to award rights to its members or social groups.

Such beneficence allows the state to engage in social engineering in excess of its mandate. That being said, where the state finds it necessary, in view of changed or new social circumstances, to award rights to members or groups, it must do without restructuring existing traditions and institutions of social life.

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